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**Narrowly Tailored But Broadly Compelling: Defending Race-Conscious
Admissions after *Fisher***

IHELG Monograph

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**NARROWLY TAILORED BUT BROADLY COMPELLING:
DEFENDING RACE-CONSCIOUS ADMISSIONS AFTER *FISHER***
[forthcoming in Volume 45 of the *Seton Hall Law Review*]

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ABSTRACT

This Article argues that *Fisher v. Texas* does not spell doom for race-conscious admissions policies, in spite of its call for universities to seriously examine whether race-neutral alternatives can attain the educational benefits of diversity. The Article analyzes the internal tension in the Supreme Court's doctrine on race-conscious admissions: on the one hand, the Court has called for universities to seriously consider race-neutral alternatives, but on the other hand, it has defined the educational benefits of diversity very broadly and granted deference to universities in defining their educational missions. Unlike constitutionally-approved remedial rationales for affirmative action, the diversity interest has no logical time limit or ceiling: diversity will continue to be important for the foreseeable future, and there is no intuitive upper limit to its benefits. Moreover, the educational benefits of diversity explicitly noted in *Fisher* and *Grutter v. Bollinger*, such as lessening of racial stereotypes and mitigating feelings of isolation among minority students, require direct attention to race.

Additionally, this Article contends that the Court's narrow tailoring principles for race-conscious policies relate directly to the diversity interest: the holistic admissions process upheld in *Grutter v. Bollinger* facilitates individualized review and nuanced consideration of race, which help to lessen racial stereotypes and which cannot be replaced adequately by race-neutral alternatives. Further, this Article illustrates that a holistic admissions process with individualized review cannot be entirely race-neutral, and that universities already place a de facto limit on their use of race in admissions, through their own academic selectivity. As a result, this article contends that universities have not reached their desired level of racial diversity and related educational benefits, and the Supreme Court's call to curb race-conscious policies runs counter to its own articulation of the educational benefits of diversity.

Finally, this Article discusses two relatively novel ways that universities can defend their race-conscious admissions policies, employing the deference *Fisher* gives them in defining their educational missions: 1. Emphasizing the educational benefits of diversity within racial groups and intragroup support among minority students; and 2. Highlighting the educational benefits of diversity that occur within race-conscious campus spaces, such as ethnic studies departments, cultural centers, and residence halls devoted to African American experiences, in addition to benefits of classroom diversity. More broadly, this Article calls upon universities to embrace race-consciousness—not only in their admissions policies but also in their educational missions. By doing so, universities can more readily illustrate how race-conscious policies and programs are tangibly related to the educational benefits of diversity.

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INTRODUCTION

With its ruling in *Fisher v. Texas*,¹ the U.S. Supreme Court indicated that it wants to see an end to race-conscious admissions policies in higher education. Although the *Fisher* majority opinion did not strike down the University of Texas at Austin (UT) admissions plan, seven Justices² agreed to remand the case for more stringent review of whether UT really needs to use a race-conscious policy, in addition to the “race-neutral” Top Ten Percent Law,³ to garner the

¹ 133 S.Ct. 2411 (2013).

² Of course, there are differing views among the individual Justices. In past cases, Justices Samuel Alito, Antonin Scalia, Clarence Thomas, and Chief Justice John Roberts have indicated their disdain for race-conscious admissions policies. See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007) (Part IV of majority opinion, authored by Chief Justice Roberts and joined by Justices Alito, Scalia, and Thomas, which states “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”) Justices Scalia and Thomas also dissented when the Court upheld race-conscious admissions policies in *Grutter v. Bollinger*, 539 U.S. 306, 346, 349 (2003) (Scalia, Thomas, J.J., dissenting) (contending that diversity in education is not a compelling state interest and it is unconstitutional for universities to use race-conscious admissions policies). Justice Anthony Kennedy also dissented in *Grutter*, although he would not categorically preclude the use of race-conscious admissions policies (“There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking. The Law School failed to comply with this requirement, and by no means has it carried its burden to show otherwise by the test of strict scrutiny.”). Justices Stephen Breyer and Ruth Bader Ginsburg voted to uphold race-conscious admissions in *Grutter*. *Id.* at 306. Justice Ginsburg also dissented in *Fisher*, on grounds that UT’s use of race in admissions had already passed strict scrutiny on the lower courts’ initial review. 133 S.Ct. at 2432 (Ginsburg, J., dissenting). Justice Sonia Sotomayor’s dissent in *Schuetz v. BAMN* (2014) suggests her support for race-conscious admissions policies. See *Schuetz* at slip op. 56 (Sotomayor, J., dissenting) (noting that “[Supreme Court] has recognized that diversity in education is paramount ... [w]ith good reason.”). Justice Elena Kagan has recused herself from *Fisher* because of her role in the case, as Solicitor General, when it was still in the U.S. District Court for the Western District of Texas.

³ Tex. Educ. Code Ann. § 51.803 (1997). The Top Ten Percent Law guarantees admissions to UT to the top students (originally top 10 percent of each graduating class) in all Texas public high schools. The law was passed by the Texas legislature in response to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)(holding that UT could not use race as an admissions factor), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003)(holding that universities could use race as a plus factor in admissions). In 2011, the Top Ten Percent Law was amended to limit guaranteed admission at UT to 75% of the seats designated for Texas residents. See Tex. Educ. Code Ann. § 51.803(a-1)(2010). This limit begins with admissions to the entering class of Fall 2011 and continues until the entering class of Fall 2015. See *Fisher v. Texas*, 631 F.3d 213, 224 n.56 (2011), *vacated and remanded*, 133 S.Ct. 2411 (2013).

This Article assumes, as the *Fisher* litigation did, that the Top Ten Percent Law is “race neutral”—meaning that there is no direct and explicit consideration of race in the decision-making process. See also Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?* 32 J.C.&U.L. 1, 8 (2005) (arguing that “in order to be considered race-neutral, it is only necessary that [programs] do not allow applicants to be classified and/or selected based on their race or ethnicity.”). *But see Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003)(Ginsburg, J., dissenting)(“Calling ... 10% or 20% plans ‘race-neutral’ seems to me disingenuous, for they ‘unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system.”); *Id.* at 298 (Souter, J., dissenting) (“‘[P]ercentage plans’ are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it.”); *Fisher*, 133 S.Ct. at 2433 (Ginsburg, J., dissenting) (“[O]nly an ostrich could regard the supposedly neutral alternatives [referring to Texas’s Top Ten Percent Law] as race

educational benefits of diversity. The majority opinion stated that “strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice[.]”⁴ and that:

...[t]he reviewing court must be ultimately satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity ... “at tolerable administrative expense.”⁵

While it did not curb university’s use of race per se, *Fisher*’s preference for race-neutral alternatives illustrates the Court’s overall antipathy towards race-conscious admissions. The *Fisher* majority emphasized that “[n]arrow tailoring ... requires that the reviewing court verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity.”⁶

However, this Article argues that *Fisher* does not spell doom for race-conscious admissions. While many commentators predicted that *Fisher* would end race-conscious admissions policies,⁷ it actually provided the best realistic outcome for proponents of these policies—given the current composition of the Supreme Court.⁸ After *Fisher*, the Court reversed the Sixth Circuit and upheld state constitutional bans on race-conscious policies in *Schuette v.*

unconscious. ... [T]he vaunted alternatives suffer from ‘the disadvantage of deliberate obfuscation.’”) (quoting Gratz at 298 (Souter, J., dissenting). See also *Fisher*, 631 F.3d at 242 n.156 *rev’d*, 133 S.Ct. 2411 (2013) (“A court considering the constitutionality of the [Top Ten Percent Law] would examine whether Texas enacted the Law (and corresponding admissions policies) because of its effects on identifiable racial groups or in spite of those effects. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); cf. Brief of Social Scientists Glenn C. Loury et al. as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), available at 2003 WL 402129, at *2, *9–*10 (noting that ‘it is not clear that [percentage] plans are actually race-neutral’ and that some *amici* counsel in *Grutter* ‘have signaled interest in moving on after this case to challenge these aspects of the Texas program’).”)

⁴ *Fisher* at 2420.

⁵ *Id.*

⁶ *Id.* The Fifth Circuit heard oral arguments in *Fisher* on remand on November 13, 2013. See <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html>.

⁷ See *Commentary on Fisher: In with a bang, out with a fizzle*. Posting of Elise Boddie to SCOTUSblog, <http://www.scotusblog.com/2013/06/fisher-v-university-of-texas-in-with-a-bang-out-with-a-fizzle/>, June 24, 2013 (noting “the many months of commentary from pundits sounding the death knell on affirmative action in higher education after oral argument in *Fisher*[.]” and that “[f]orecasting the death of race-conscious policies has become a spectator sport.”).

⁸ See *Affirmative Action Survives—For Now*, Posting of Vinay Harpalani to IIT Chicago-Kent Faculty Blog, <http://blogs.kentlaw.iit.edu/faculty/2013/06/24/affirmative-action-survives-for-now/> (June 24, 2013).

BAMN (2014);⁹ however, in doing so, Justice Anthony Kennedy’s controlling opinion made clear that *Schuette* was “not about the constitutionality or the merits [] of race-conscious admissions policies in higher education ... [or] permissib[ility]”¹⁰ of such policies, but rather about whether the courts should ultimately decide this issue.¹¹ Although a majority of Justices would like to see an end to race-conscious admissions policies, the rulings in *Fisher* and *Schuette* suggest that Justice Kennedy, along with Chief Justice Roberts and Justice Alito, would prefer political process rather than judicial mandate accomplish this end.¹² With these two rulings, universities are permitted, but not required, to use race-conscious admissions. *Schuette* held that political process can eliminate this permission, but absent this, *Fisher* allows use of race and governs how universities must implement race-conscious admissions.

Moreover, even as *Fisher* guides lower courts to stringently review whether universities need to use race, the Supreme Court has broadly defined the educational benefits of diversity—the compelling interest that justifies race-conscious admissions policies. Some of the educational benefits articulated by *Fisher* inherently incorporate a level of race-consciousness, such as “lessening of racial isolation and stereotypes,”¹³ “promot[ing] cross-racial understanding,”¹⁴ and “enabl[ing] [students] to better understand persons of different races.”¹⁵

⁹ *Schuette* - add full citation when Supreme Court Reporter cite is available.

¹⁰ *Id.* at 4 (in slip op.)

¹¹ *Id.*

¹² *Id.* at (18 in slip op.) (noting that *Schuette* “is note about how the debate about race preferences should be resolved ... [i]t is about who may resolve it.”). It is noteworthy that Chief Justice Roberts and Justice Alito joined Justice Kennedy’s *Schuette* opinion, and also that neither of them wrote separately in *Fisher*—as Justices Scalia and Thomas did to express greater disdain for *Grutter*. See *Fisher* at ___. There is little doubt that Justices Roberts and Alito, and also Justice Kennedy, would like to end to race-conscious admissions policies. However, their recent jurisprudence suggests that none of them want the Court to deliver a sweeping mandate for universities to do so, preferring to let other actors erode the use of race gradually.

¹³ *Fisher* at 2418. Of course, *Fisher* recapitulated much of the holding in *Grutter*. See also *Grutter* at 308 (holding that “substantial, important, and laudable educational benefits that diversity is designed to produce, include[e] cross-racial understanding and the breaking down of racial stereotypes.”); *Id.* at 319. (noting that “critical mass” entails ““numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.”).

¹⁴ *Grutter* at 330 (“[T]he educational benefits that diversity is designed to produce ... are substantial [and include] promot[ing] ‘cross-racial understanding,’ ... break[ing] down racial stereotypes, and ‘enabl[ing] [students] to better understand persons of different races.’”).

Also, *Grutter* and *Fisher*'s compelling interest in diversity (the "diversity interest") goes hand in hand with the Court's narrow tailoring principles—its endorsement of the race-conscious holistic admissions policy¹⁶ upheld in *Grutter*, in contrast with its rejection of the race-conscious mechanical point system struck down in *Gratz v. Bollinger*.¹⁷ The holistic admissions plan upheld in *Grutter* facilitates the race-conscious educational benefits articulated by the Court—in a manner not readily replicable by race-neutral alternatives.¹⁸

The Supreme Court has reaffirmed this diversity interest in several cases now, and Justice Anthony Kennedy—the Court's current swing vote—has articulated his support for diversity as a compelling interest in various majority, concurring, and dissenting opinions.¹⁹ Additionally, in *Bakke*, *Grutter* and *Fisher*, the Court also gave deference to universities in defining their own

¹⁵ *Id.*

¹⁶ This Article defines a "holistic" admissions policy as one where various factors, from academic achievement to extracurricular activities to race, are subjectively considered together and weighed by admissions reviewers to make admissions decisions. This can be contrasted with an admissions system which gives fixed weights to those various factors and applies objective, mechanical formulas to determine who should be admitted. Compare *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding University of Michigan Law School admissions policy, which used race as a flexible, individualized plus factor, as part of a holistic admissions process) with *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down University of Michigan undergraduate admissions policy for College of Literature, Science, and the Arts, which used a mechanical point system that automatically awarded 20 points (on a 150 point scale) to all self-identifying underrepresented minority applicants).

¹⁷ *Id.* See also *Fisher* at 2416 ("In *Grutter*, the Court upheld the use of race as one of many 'plus factors' in an admissions program that considered the overall individual contribution of each candidate. In *Gratz*, by contrast, the Court held unconstitutional Michigan's undergraduate admissions program, which automatically awarded points to applicants from certain racial minorities.").

¹⁸ See *infra* Part II.B.

¹⁹ See *Grutter* at 387-88 (Kennedy, J., dissenting) ("The [Bakke concurring] opinion by Justice Powell, in my view, states the correct rule for resolving [*Grutter*]. ... Justice Powell's approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission. ... Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task ..."); *Id.* at 392-93 (Kennedy, J., concurring) ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity ..."); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 797-98 (2007) (Kennedy, J., concurring) ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered."); *Fisher v. Texas*, 133 S.Ct. 2411, 2418 (2013) ("The attainment of a diverse student body ... serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes. ... 'The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.' ... In *Grutter*, the Court reaffirmed his conclusion that obtaining the educational benefits of 'student body diversity is a compelling state interest that can justify the use of race in university admissions.'").

educational missions to incorporate the compelling interest in diversity.²⁰ This deference, in conjunction with the specific educational benefits of diversity espoused by the Court, allows universities to define and implement their educational missions in a manner that facilitates their defense of race-conscious admissions. They can take advantage of the broadly-defined compelling interest in diversity and narrowly tailor their race-conscious policies and programs to various aspects of this diversity interest. *Fisher* requires universities to do so, and this Article argues that universities can meet this requirement if they embrace race-consciousness more broadly in their educational missions.²¹

Part I focuses on the broadly-defined compelling interest in diversity upheld in *Grutter* and reinforced in *Fisher*. This Part argues that unlike remedial rationales for race-conscious policies, the compelling interest in diversity has no inherent time limit and no inherent ceiling. It further argues that the notion of “critical mass” of minority students—accepted as a “limit” by both parties in *Fisher*²²—cannot be assessed reliably: the Supreme Court did not even try to apply “critical mass” as a limiting principle in *Fisher*. This Part also contends that *Grutter* and *Fisher*’s articulation of the diversity interest can readily justify race-consciousness in admissions and in university activities: it includes educational benefits as “lessening of racial ... stereotypes[,]”²³ “promot[ing] cross-racial understanding,”²⁴ and “enabl[ing] [students] to better

²⁰ *Fisher* at 2419 (“[A] university’s ‘educational judgment that such diversity is essential to its educational mission is one to which we defer.’”)(quoting *Grutter* at 328).

²¹ The goal of this Article is to aid universities in defending race-conscious admissions policies in light of *Fisher*. This Article does not attempt to resolve the tension in Supreme Court’s doctrine between the broad diversity interest and the call for race-neutrality. This tension is likely a result of compromises between various Justices on the Court, in conjunction with the Court’s need to maintain institutional legitimacy. See *supra* n.2; *Commentary on Fisher: In with a bang, out with a fizzle*. Posting of Elise Boddie to SCOTUSblog, <http://www.scotusblog.com/2013/06/fisher-v-university-of-texas-in-with-a-bang-out-with-a-fizzle/>, June 24, 2013 (“*Fisher* may suggest that the Court has become concerned about its institutional legitimacy and, therefore, is now wary of issuing sweeping decisions that depart radically from precedent.”).

²² The parties in *Fisher* agreed that “critical mass” was a conceptual limit on race-conscious admissions; they disagreed on whether UT had reached that limit with the Top Ten Percent Law alone. See *infra* Part ___

²³ *Fisher* at 2418. See also *Grutter* at at 308 (holding that “substantial, important, and laudable educational benefits that diversity is designed to produce, include[e] cross-racial understanding and the breaking down of racial stereotypes.”).

understand persons of different races”;²⁵ and also policies and programs designed to ameliorate minority students’ feelings of isolation and tokenism.²⁶

Part II illustrates how *Grutter* and *Fisher*’s narrow tailoring principles relate to the compelling interest in diversity. It argues that features of holistic admissions, such as individualized review and nuanced consideration of race, facilitate the diversity interest and necessitate race-consciousness to do so. Further, this Part illustrates that a holistic admissions policy with individualized review cannot be entirely race-neutral. It also contends that elite universities already place a de facto limit on their use of race in admissions, through their own academic selectivity. This de facto limit already precludes elite universities from attaining levels of racial diversity and related educational benefits which they may desire. For all of these reasons, *Fisher*’s call for stringent review of race-conscious admissions policies need not lead to their demise.

Part III illustrates how universities can use the broadly-defined compelling interest in diversity, facilitated by narrowly tailored policies, to defend race-conscious admissions and highlight educational benefits that necessitate such policies. This Part first reviews the Supreme Court’s deference to universities in defining their educational missions. It then focuses on two novel ways that universities can not only bring racial diversity, but race-consciousness itself in their educational missions: 1. Emphasizing the educational benefits of diversity within racial groups and intragroup support among minority students; and 2. Highlighting the educational

²⁴ *Grutter* at 330 (“[T]he educational benefits that diversity is designed to produce ... are substantial [and include] promot[ing] ‘cross-racial understanding,’ ... break[ing] down racial stereotypes, and ‘enabl[ing] [students] to better understand persons of different races.’”).

²⁵ *Id.*

²⁶ *Grutter* at 319 (noting that minority students should not “feel isolated or like spokespersons for their race.”).

benefits of diversity and support for minority students that occur within race-conscious campus spaces,²⁷ such as residence halls devoted to African American experiences.

Both diversity within racial groups and race-conscious campus spaces underscore the need for race-conscious admissions policies to attain the educational benefits of diversity.

The Conclusion reiterates these points and also calls upon universities to embrace race-consciousness more broadly—not only in their admissions policies but also in their educational missions and campus activities that promote the benefits of diversity. Future defense of race-conscious admissions will require that universities be open and assertive about the importance of race, not only in admissions, but in in their educational missions and in everyday campus life.

I. BROAD SCOPE OF THE COMPELLING INTEREST IN DIVERSITY

The Supreme Court has adopted a broad notion of the compelling interest in diversity,²⁸ allowing universities to incorporate race-consciousness in their educational missions in various ways. The Court has given deference to universities in defining their educational missions, and it has specifically noted educational goals that directly implicated race: lessening racial stereotypes, facilitating cross-racial dialogue, and mitigating feelings of isolation and tokenism among minority students.²⁹ These are all important undertakings that facilitate the educational benefits of diversity, and there is no reason to believe their importance will diminish in the foreseeable future.

A. Educational Benefits of Diversity: What are the Limits?

²⁷ This Article operationally defines a “race-conscious campus space” as a physical campus location or campus initiative or activity that focuses on racial identity, whether for a specified racial group or in a more general sense (i.e., a campus lecture or film series on race).

²⁸ Justice Clarence Thomas noted this in his *Grutter* dissent, where he states that the “compelling state interest ... [in diversity] ... is actually broader than might appear at first glance.”). *Grutter* at 354 (Thomas, J., dissenting).

²⁹ See *infra* nn. ___

The compelling interest in diversity was first articulated in Justice Lewis Powell's concurring opinion in *Regents of the University of California v. Bakke*.³⁰ Justice Sandra Day O'Connor's majority opinion in *Grutter v. Bollinger* affirmed the diversity interest and provides the most elaborate discussion of it in Supreme Court jurisprudence.³¹ Professor Devon Carbado identifies eight benefits of diversity that Justice O'Connor espouses in her *Grutter* majority opinion: diversity serves to “promote speech and the robust exchange of ideas ... effectuate the inclusion of underrepresented students ... change the character of the school ... disrupt and negate racial stereotypes ... facilitate racial cooperation and understanding ... create pathways to leadership ... ensure democratic legitimacy ... [and] ... prevent racial isolation and alienation[.]”³² *Grutter*'s articulation of the diversity interest, which was incorporated into *Fisher*,³³ shows how the educational benefits of diversity for society are long-term, occur at the societal and campus/classroom levels, and are tied to race in a nuanced manner.

These benefits have no obvious or intuitive end point. At the Supreme Court oral argument in *Fisher*, Chief Justice Roberts pressed UT counsel Gregory Garre on the “logical end point” of race-conscious admissions,³⁴ but Mr. Garre did not have an adequate answer. Neither

³⁰ *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-12 (1978) (Powell, J., concurring)(finding that “the attainment of a diverse student body ... clearly is a constitutionally permissible goal for an institution of higher education.”). Justice Powell stated that while racial set-asides were unconstitutional, race could be used as an individual “plus” factor for applicants, in order to achieve the compelling interest of attaining the educational benefits of diversity. *Id.* at 317 (“[R]ace or ethnic background may be deemed a ‘plus’ in a particular applicant's file ... [and] ... does not insulate the individual from comparison with all other candidates for the available seats.”).

³¹ *See supra* nn.23-24. Of course, there are also many social science studies and reports that examine the educational benefits of diversity. *See, e.g.*, Expert Witness Report of Patricia Y. Gurin at 12, *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001) (No. 97-75321), 1998 WL 35140040, reprinted in 5 *Mich. J. Race & L.* 363 (1999); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); *see generally* amicus briefs filed in *Fisher* in support of UT, available <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html#remand>

³² Devon Carbado, *Intraracial Diversity*, 60 *UCLA L. REV.* 1130, 1145-46 (2013).

³³ *See supra* nn.19-25 and accompanying text.

³⁴ Transcript of Oral argument at 47, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345) (Chief Justice John Roberts asking UT counsel Gregory Garre about “logical endpoint to [UT's] use of race.”). *See also* *Grutter* at 342 (“[R]ace-conscious admissions policies must be limited in time. ... [A]ll governmental use of race must have a logical end point.”).

the oral argument nor the *Fisher* opinion itself shed light on any such “logical end point.”³⁵

There are two ways to think about a potential limit on the compelling interest in diversity that would serve as such a “logical end point.”³⁶ First, there could be time in the future when diversity is no longer a compelling interest, such that using race in admissions is not constitutionally justified. Second, there could be a particular level of the educational benefits of diversity which, if attainable by race-neutral means, would also constitutionally proscribe use of race. The first of these would not be logical: if diversity is a compelling interest now, it would probably be even more so in the future, as American society becomes more diverse. The second potential limit was the basis of the Plaintiffs’ claim in *Fisher*: they contended that UT had attained a “critical mass” of minority students by race-neutral means.³⁷ This also failed to provide a reliable limit, and under the *Grutter/Fisher* framework, it would be exceedingly difficult to define one.

1. End Point: “Ageless into the Future”

At the societal level, Justice O’Connor noted student body diversity “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”³⁸ Justice O’Connor also highlighted the importance of student diversity for success in an “increasingly global marketplace[,]”³⁹ and for the military to assure American’s national security interests.⁴⁰ The *Grutter* majority thus concluded that “[i]n order to cultivate a

³⁵ See *infra* Part ____

³⁶ See Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 503 n.72.

³⁷ See *infra* Part ____

³⁸ *Grutter* at 330.

³⁹ *Id.* (“[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”)

⁴⁰ *Id.* at 331 (high-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps ... is essential to the military’s ability to fulfill its principle mission to provide national security.”)

set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”⁴¹

All of these reasons to pursue diversity and its educational benefits will be valid into the foreseeable future: they will probably become even more important as America becomes a more diverse society. The compelling interest in diversity is different from other compelling state interests such as national security emergencies,⁴² because diversity is not inherently limited in time and scope—the compelling interest does not end once the emergency passes. Prior to *Grutter*, in *Wygant v. Jackson Board of Education*⁴³ and *City of Richmond v. J.A. Croson Co.*,⁴⁴ the Supreme Court struck down race-conscious policies that were rooted in broad, remedial rationales rather than diversity. The *Croson* Court limited remedial rationales to “the ‘focused’ goal of remedying ‘wrongs worked by specific instances of racial discrimination.’”⁴⁵ It rejected “the remedying of the effects of ‘societal discrimination,’”⁴⁶ as a compelling interest, because societal discrimination constituted “an amorphous concept of injury that may be ageless in its reach into the past.”⁴⁷ The Court’s distinction here was tied directly to the termination of the remedy: it is much easier to determine the “logical end point” of a focused remedy for specific instances of discrimination than it is for a broad remedy of societal discrimination.

However, when upholding and defining the compelling interest in diversity, the *Grutter* majority did not follow this reasoning. Just as societal discrimination “maybe ageless in its reach

⁴¹ *Id.* at 332. See also *Bakke* at 313 (Powell, J., concurring) (“[T]he nation's future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”).

⁴² *Fisher*, 133 S.Ct. at 2423 (Thomas, J., concurring) (nothing that “the Court [has] recognized that protecting national security may satisfy [the] exacting standard” of strict scrutiny.) (citing *Korematsu v. U.S.*, 323 U.S. 214, 217-18 (1944)).

⁴³ 476 U.S. 267 (1986).

⁴⁴ 488 U.S. 469 (1989).

⁴⁵ *Croson* at 497-98 (quoting Powell in *Bakke* at 308-309).

⁴⁶ *Id.* at 498.

⁴⁷ *Id.*

into the past,”⁴⁸ diversity is ageless in its reach into the future.⁴⁹ Justice O’Connor’s *Grutter* opinion did state that as part of its narrow tailoring requirement, “all race-conscious admissions programs have a termination point.”⁵⁰ However, as Professor Ronald Krotoszynski notes:

We should expect that at some discrete time in the future efforts to remediate past discrimination, unlike diversity programs, will have some natural stopping point: when the contemporary effects of the past discrimination have been completely negated, when the contemporary effects of the past discrimination are so attenuated that nothing is left to remediate, or some combination of the two. On the other hand, diversity programs should in theory be relevant so long as we believe that pluralism is relevant to the excellence and success ...⁵¹

Unlike remediation for past government discrimination, the diversity interest has not been limited in scope by Supreme Court doctrine. In fact, *Grutter* and *Fisher* give deference to universities in defining their educational missions⁵²—thus allowing them to espouse a broad notion of the educational benefits of diversity.

For a compelling interest that is so broad, it is difficult to fashion a time-limited remedy, and the narrow tailoring requirement must be interpreted in a context-specific manner.⁵³ In spite

⁴⁸ *Bakke* at 307.

⁴⁹ The Supreme Court also missed this point in its analysis of *Parents Involved*. *Parents Involved* at 729 (noting that “working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent.”). Here, the Court does not acknowledge the fact that even if the “level of diversity” could be identified and measured reliably and consistently, there is no logical end point when it can necessarily be achieved without race-conscious measures.

⁵⁰ *Grutter* at 342 (citing *Bakke*, *Wygant*, and *Croson*).

⁵¹ Ronald J. Krotoszynski, *The Argot of Equality: On the Importance of Disentangling “Diversity” and “Remediation” as Justifications for Race-Conscious Government Action*, 87 Wash. U. L. Rev. 907, 936-37(2010). See also *id.* at 935-36 (“If diversity is generally a good thing and, in any case, often demonstrably correlates positively to enhanced results, there should not be any need to sunset diversity programs. ... Does anyone think that learning in an all-white, all-male college or university will ever be superior to learning in a comprehensively integrated environment? ... If one viewed the law school’s program in *Grutter*, at least with respect to race, as either remedial in nature or as a dual effort at both diversity and remediation, a sunset requirement would make perfect sense. After all, once a governmental entity has remediated the present effects of past discrimination, there would be no need for further remedial efforts. What we see, then, is that the Supreme Court itself tends to revert into a remedial mindset even when, in theory, discussing a diversity program.”).

⁵² *Fisher* at 2419 (“[A] university’s ‘educational judgment that such diversity is essential to its educational mission is one to which we defer.’”)(quoting *Grutter* at 328).

⁵³ See *Grutter* at 333-34 (“[T]he contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs ... must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education.”); Ian Ayres and Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After*

of its pressing desire to end race-conscious policies, the Supreme Court has not resolved this internal conflict in its own doctrine.⁵⁴ Nevertheless, universities can draw upon the broad diversity interest to defend their continued use of race-conscious admissions policies.⁵⁵

2. Ceiling: How Much Diversity is Enough?

In addition to lacking an intuitive time limit, the compelling interest in diversity also lacks an intuitive “ceiling”—a limit on amount of diversity for which race-conscious policies are allowable.⁵⁶ Professor Ian Ayres and Sydney Foster argue that narrow tailoring should allow only the “minimum necessary preference” based on race to attain the educational benefits of diversity,⁵⁷ but even they acknowledge that “[i]t is difficult to quantify the burdens of racial preferences and even more difficult to quantify government interests in nonremedial affirmative action.”⁵⁸ There is no obvious point at which greater diversity no longer yields additional benefits. One could argue that there are diminishing returns to educational benefits of diversity: given the time and space constraints, students cannot experience all perspectives and educational opportunities that might be available in classrooms and on campuses more generally. After a certain level of diversity, the costs associated with race-conscious admissions policies might

Grutter and Gratz, 85 TEX. LAW REV. 517, 577 (“[T]he narrow tailoring inquiry has always had multiple dimensions.”).

⁵⁴ There are different ways to resolve this conflict. One could take the view, as Justice Thomas does, that for these reasons, diversity should not be a compelling interest. *Fisher*, 133 S.Ct. at 2423-24 (Thomas, J., concurring) (“*Grutter* was a radical departure from our strict-scrutiny precedents. ... “[T]here is nothing “pressing” or “necessary” about obtaining whatever educational benefits may flow from racial diversity.”). Conversely, one could take the view that the Court should recognize that the compelling interest that justifies race-conscious admissions policies is not just diversity, but also partly remediation. *See Krotoszynski*, *supra* n.51, at 936-37. Under this view, the end point for race-conscious admissions policies would be elimination of the academic disparities that necessitate them. *See infra* Part II.D.2.

This Article does not aim to pose a resolution: rather, it aims to guide universities in defending their race-conscious admissions policies.

⁵⁵ *See infra* Part III.

⁵⁶ *See Harpalani, supra* n.36, at 503 n.72.

⁵⁷ Ayres and Foster, *supra* n.53, at 576.

⁵⁸ *Id.* at 583.

begin to outweigh any additional benefits.⁵⁹ But the determination of this point would be largely arbitrary—contingent completely on subjective value judgments about the relative costs and benefits of attaining diversity at a particular institution. Given the deference that *Grutter* and *Fisher* grant to universities in defining their educational missions, it is difficult to see how courts could fashion judicially manageable standard to assess the costs and benefits of diversity.

Of course, courts could try to set artificial limits on the diversity interest. However, *Bakke* and *Grutter* both ruled that most consistent and reliable method to measure diversity, proportional representation of minority students relative to some external locality, is “patently unconstitutional”—as is any numerical target for minority enrollment.⁶⁰ The one standard that courts could most consistently apply in judicial review is precisely the standard that the Supreme Court does not want them to apply.⁶¹

For this reason, the concept of a “critical mass” of minority students took center stage in the *Fisher* litigation—as a potential “ceiling” and limiting principle for race-conscious admissions. The parties agreed on “critical mass” as a standard: they argued about whether UT had enrolled a “critical mass” of minority students with the Top Ten Percent Law alone. Nevertheless, *Fisher* itself demonstrated that “critical mass” cannot be defined precisely enough to work effectively as a limiting principle for race-conscious admissions policies.

B. “Critical Mass” Conundrum

⁵⁹ Professor Ayres and Foster do recommend such a cost-benefit analysis, but they also “recognize that the cost and benefit quanta are difficult to compare.” *Id.* at 580.

⁶⁰ *Bakke* at 307 (“If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.”); *Grutter* at 329-330 (“The Law School’s interest is not simply ‘to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.’ . . . That would amount to outright racial balancing, which is patently unconstitutional.”).

⁶¹ For a general explanation of why the Supreme Court has ruled proportional representation and numerical goals to be unconstitutional, see Harpalani, *supra* n.36, at, 485-95.

The idea of a “critical mass” of minority students derives from the *Grutter* litigation and opinion. The *Grutter* majority elaborated on Justice Powell’s articulation of the diversity interest—in a manner that implicates the nuanced benefits of race-consciousness on campus and in the classroom. In his *Bakke* concurrence, Justice Powell focused on race as one of many important student characteristics, stating that the compelling interest is “not an interest in simple ethnic diversity ... [but rather] ... encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁶² *Grutter*’s articulation of diversity interest incorporated this nuance, by introducing the concept of a “critical mass” of minority students—an idea that has generated much discussion and confusion.⁶³ “Critical mass” was supposed to be more nuanced than a numerical target, but it proved to be much more elusive as well.

1. “Critical Mass” and the Compelling Interest in Diversity

In articulating the meaning of “critical mass,” Justice O’Connor noted that:

[T]he Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. ... These benefits are substantial. As the District Court emphasized, the Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.”⁶⁴

Accordingly, the *Grutter* majority concluded that:

when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no “minority viewpoint” but rather a variety of viewpoints among minority students.⁶⁵

⁶² *Bakke* at 315 (Powell, J. , concurring). This language was quoted twice in *Fisher*. *Fisher* at 2418.

⁶³ See generally Harpalani, *supra* n.36; Fisher’s *Fishing Expedition*, 15 U. PA. J. CONST. L. HEIGHT. SCRUTINY 57, 58-66 (2013).

⁶⁴ *Id.* at 330. See also *id.* at 308 (holding that “the Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes. ... Thus, the Law School has a compelling interest in attaining a diverse student body.”).

⁶⁵ *Id.* at 319-20. See also *id.* at 333 (“The Law School does not premise its need for critical mass on ‘any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.’ ... To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one

Thus, *Grutter* tied the notion of “critical mass” directly to the educational benefits of diversity—specifically “promot[ing] cross-racial understanding” and “break[ing] down racial stereotypes.”⁶⁶

Similarly, *Fisher* later described these benefits as “lessening of racial isolation and stereotypes[.]”⁶⁷ and “enabl[ing] [students] to better understand persons of different races.”⁶⁸

Additionally, the *Grutter* majority opinion did point to the trial phase of *Grutter*, where the University of Michigan Law School argued that “critical mass” does not imply any particular number or percentage, but rather “numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.”⁶⁹ In this vein, the concept of “critical mass” ties the educational benefits of diversity to the feelings and experiences of underrepresented minorities on campus. As Professor Bennett Capers notes:

[C]ritical mass is not solely numerical. Rather, a critical mass implies a climate where one is neither conspicuous nor on display, where one does not feel the opprobrium of being a token, nor the burden of being the designated representative for an entire group. It also implies a climate where one can speak freely, where one not only has a voice, but a voice that will be heard.⁷⁰

Both the *Grutter* majority and Professor Capers recognized that in order to attain the educational benefits of diversity—breaking down racial stereotypes and facilitating cross-racial understanding—minority students cannot feel isolated or tokenized. One can thus view the compelling interest in diversity that justifies race-conscious admissions combining two related aspects: 1. Tangible educational benefits such breaking down stereotypes and promoting

that it cannot accomplish with only token numbers of minority students.”). This language in *Grutter* speaks to the immediate, proximal impact of having a critical mass but it still does not suggest how to determine if it is present—an issue that was at play in *Fisher*, but which the Supreme Court did not address in its *Fisher* opinion. See *infra* Parts II.B. and II.C.

⁶⁶ *Grutter* at 330.

⁶⁷ *Fisher* at 2418. See also *Grutter* at at 308 (holding that “substantial, important, and laudable educational benefits that diversity is designed to produce, include[e] cross-racial understanding and the breaking down of racial stereotypes.”).

⁶⁸ *Id.*

⁶⁹ *Id.* at 319.

⁷⁰ I. Bennett Capers, *Flags*, 48 *How. L.J.* 121, 122-23 (2004).

interactions between students of different races; and 2. Mitigation of feelings of isolation and tokenism among minority students, so that these educational benefits can occur. At the Supreme Court argument, both parties in *Fisher* focused on the latter.

2. Measuring “Critical Mass”: “Call it a Cloud or Something”

Ironically, both the *Fisher* Plaintiffs and UT agreed that a “critical mass” is attained when minority students no longer feel “isolated or like spokespersons for their race.” The *Fisher* Plaintiffs combined numerical goals with the notion of critical mass. They contended that UT should define, *ex ante*, specific numerical criteria for critical mass, such as a range or target enrollment where minority students are no longer isolated.⁷¹ At oral argument, they stated that lack of such criteria for “critical mass” was “a flaw in ... *Grutter*[.]”⁷² and asked the Court to require them.⁷³ When Justice Sotomayor pressed the Plaintiffs; counsel on the “standard of critical mass” and asked him what “fixed number” is sufficient, he replied only that it is “not [the Plaintiffs’] burden to establish that number.”⁷⁴

However, it is difficult to understand the Plaintiff’s view of critical mass as “a range” in terms other than a numerical goal/target (even if it is a flexible one). *Bakke* and *Grutter* proscribed such numerical goals,⁷⁵ and Justice Sotomayor recognized this at oral argument when she said to Plaintiffs’ counsel: “Boy, it sounds awfully like a quota to me that you shouldn’t be

⁷¹ Transcript of Oral argument at 19, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345) (Plaintiff’s counsel Bert Rein arguing that “having a range, a view as to what would be an appropriate level of comfort, critical mass” is necessary for narrow tailoring of race-conscious admissions policies.).

⁷² *Id.* at 13 (Plaintiffs’ counsel Bert Rein stating that not having working criteria for critical mass is “a flaw ... in *Grutter*” and that the Supreme Court should “restate that principle.”).

⁷³ *Id.*

⁷⁴ *Id.* at 16-17. Justice Sotomayor used the term “fixed number” to illustrate how the Plaintiffs’ view of “critical mass” is similar to a quota. See text accompanying *infra* n.76.

⁷⁵ *Grutter* at 329-330 (noting that “[t]he Law School’s interest is not simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin ... [t]hat would amount to outright racial balancing, which is patently unconstitutional.”) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)).

setting goals, that you shouldn't be setting quotas"⁷⁶ Moreover, how would a university know ex ante whether any number or percentage of minority students would mitigate feelings of isolation on campus? Feelings of isolation and tokenism are not just contingent on minority student numbers; student support resources, minority faculty and staff mentors, and many other factors contribute to whether minority students feel isolated.⁷⁷ Even if quotas were not unconstitutional, the *Fisher* Plaintiffs' view would be problematic.

Unlike the Plaintiffs, UT argued that critical mass should be measured ex post. UT argued that courts could review the presence of a "critical mass" via surveys on isolation felt by minority students and related criteria,⁷⁸ rather than be determined by an ex ante numerical goal. Nevertheless, UT's view of critical mass was also problematic: it did not offer any concrete standard for when minority students no longer feel isolated (which would supposedly serve as stopping point for race conscious admissions policies).⁷⁹ The Justices pressed this point repeatedly at the *Fisher* oral argument. Chief Justice Roberts asked UT's counsel, Gregory

⁷⁶ Transcript of Oral argument at 19, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345). *But see* Sheldon Lyke, *Catch Twenty-Wu? The Oral Argument in Fisher v. University of Texas and the Obfuscation of Critical Mass*, 107 NW. U. L. REV. COLLOQUY 209, 216 (2013), available at <http://www.law.northwestern.edu/lawreview/colloquy/2013/19/LRColl2013n19Lyke.pdf> (arguing that "critical mass has both quantitative and qualitative elements" and that "contrary to Justice Sotomayor's claim[,] . . . goals and quotas are [not] synonymous.").

⁷⁷ See William C. Kidder, *The Salience of Racial Isolation: African Americans' and Latinos' Perceptions of Climate and Enrollment Choices with and without Proposition 209*, Report of the Civil Rights Project at UCLA, at 13, http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-salience-of-racial-isolation-african-americans2019-and-latinos2019-perceptions-of-climate-and-enrollment-choices-with-and-without-proposition-209/Kidder_Racial-Isolation_CRP_final_Oct2012.pdf ("Notwithstanding the complexities of campus climate and critical mass . . . data from leading research universities show that higher levels of racial diversity are generally better for the campus climate faced by African American students, whereas racial isolation in combination with an affirmative action ban is associated with a more inhospitable racial climate."); *Id.* at 13 ("The data lend support to the concept of "critical mass" while acknowledging that context matters and it is unrealistic to expect an across-the-board numerical definition of what constitutes sufficient critical mass."); Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1233 (2010) (acknowledging "the power of creating critical mass and a diverse classroom" but noting that "stigma and racism . . . were still present."); Tara J. Yosso et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate for Latina/o Undergraduates*, 79 HARV. EDUC. REV. 659, 660 (2009) (examining the ways in which Latinas/os respond to racial microaggressions and confront hostile campus racial climates); JULIE J. PARK, *WHEN DIVERSITY DROPS: RACE, RELIGION, AND AFFIRMATIVE ACTION IN HIGHER EDUCATION* (2013) (analyzing impact of racial diversity on campus life).

⁷⁸ Transcript of Oral argument at 48, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345).

⁷⁹ For an elaboration of this critique, see Harpalani, *supra* n.36, at 510.

Garre, “when will we know that you’ve reached a critical mass?”⁸⁰ Mr. Garre’s response was that “we look to feedback directly from students about racial isolation that they experience ... [d]o they feel like spokespersons for their race.”⁸¹ Further, he argued that courts could review university’s determinations in this regard, by looking to surveys of students and other sources.⁸² Chief Justice Roberts, in particular, did not seem impressed with this answer.⁸³ Even if these criteria for “critical mass” can be reliably assessed,⁸⁴ UT’s counsel did not suggest how universities or courts could determine whether race-conscious policies are still necessary to attain them. For this reason, Justice Scalia quipped that “[w]e should probably stop calling it critical mass ... [c]all it a cloud or something like that.”⁸⁵

Justice Scalia’s skepticism about “critical mass” as a measurable entity or a stopping point is understandable. It is likely that some percentage of minority students will feel “isolated or like spokespersons” for the foreseeable future, even if minority enrollment increases significantly.⁸⁶ In *Grutter*, the University of Michigan Law School did not actually contend that it had reached a “critical mass” of any minority group; rather, it only contended that its race-

⁸⁰ Transcript of Oral argument at 45-46, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345) (Chief Justice Roberts asking UT’s counsel “you won’t tell me what the critical mass is ... when will we know that you’ve reached a critical mass?”).

⁸¹ *Id.* at 46.

⁸² *Id.* at 47.

⁸³ *Id.* (Chief Justice Roberts snidely asking Mr. Garre, “So you, what, you conduct a survey and ask students if they fell racially isolated? ... And that’s the basis for our Constitutional determination?”).

⁸⁴ See e.g., William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 63 (2013) (“The benefits associated with ‘critical mass’ are highly context-dependent and not amenable to a one-size-fits-all admissions target, but these benefits are no less real and measurable because they are manifest in the complex system of higher learning.”). Chancellor Kidder’s assertion about critical mass here also distinguishes between two different uses of the concept: 1. Universities’ campus-specific determinations of diversity’s benefits and minority students’ needs, which this Article endorses (see *supra* n.77.); and 2. Courts’ use of critical mass as a generalizable standard to review the constitutionality of race-conscious admissions policies, which this Article critiques. See also Kidder, *supra* n.77, at 13 (“The data lend support to the concept of “critical mass” while acknowledging that context matters and it is unrealistic to expect an across-the-board numerical definition of what constitutes sufficient critical mass.”).

⁸⁵ Transcript of Oral argument at 70-71, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345). The courtroom erupted in laughter after Justice Scalia made this statement.

⁸⁶ See *supra* n.77 and accompanying text.

conscious admissions policy “seeks” to attain this “goal.”⁸⁷ If the standard for “critical mass” is an environment where most minority students no longer felt isolated, then it is likely that no predominantly-White university has ever had a “critical mass”: studies suggest that many minority students still do feel quite isolated and tokenized on college campuses.⁸⁸ The novelty of the college experience itself produces feelings of isolation among some students of all racial backgrounds—and such feeling may be exacerbated by the experiences of minority students. All of these suggest reasons to augment race-conscious policies, rather than to stop them.

Moreover, “critical mass” can vary between universities based on local history, demographics, and politics, or the institution’s history and educational mission, all of which can also change over time. It may also be different for different racial groups.⁸⁹ Universities can continue to argue that increasing minority enrollment brings them closer to a “critical mass,” and that race-conscious policies serve to help minority students feel less isolated. However, “critical mass” is an imprecise, hypothetical concept. If universities themselves, with their expertise, cannot determine what a “critical mass” is, then how can courts use it as a test for the constitutionality of race-conscious admissions policies?

Consequently, it would be difficult to devise a consistent standard to determine whether an institution has attained a “critical mass,”⁹⁰ or to apply any standard developed in one case to

⁸⁷ See *Grutter* at 329 (“As part of its goal of ‘assembling a class that is both exceptionally academically qualified and broadly diverse,’ the Law School seeks to ‘enroll a ‘critical mass’ of minority students.’”)(emphasis added). The University of Michigan Law School’s brief in *Grutter* also suggests that enrollment of a “critical mass” is a “hope” rather than an outcome it attains each year. See Brief of Respondents at 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236 (“[T]he Law School hopes that its policy will enroll a “critical mass” of minority students.”)(emphasis added). See also Harpalani, *supra* n.36, at 480-83.

⁸⁸ See *supra* n.77.

⁸⁹ See *Fisher v. Texas*, 631 F.3d 213, 238 (5th Cir. 2011), *rev’d*, 133 S.Ct. 2411 (2013) (“The educational benefits recognized in *Grutter* go beyond the narrow ‘pedagogical concept’ urged by Appellants. On this understanding, there is no reason to assume that critical mass will or should be the same for every racial group or every university.”); See also Harpalani, *supra* n.36, at t 479-83 (discussing “[w]hy critical mass can vary for different minority groups[.]”).

⁹⁰ When *Fisher* was appealed to the Fifth Circuit, the amicus brief of the Mountain States Legal Foundation made a similar claim. See Brief for Mountain States Legal Foundation as Amicus Curiae at 14, *Fisher v. Texas*, 631 F.3d 213 (5th Cir. 2011) *rev’d*, 133 S.Ct. 2411 (2013) (“[B]ecause critical mass cannot be quantified, no court is able to

another. Measurement of the diversity interest, in this vein, does not present any judicially manageable standard.⁹¹ For this reason, in spite of the prominence of “critical mass” at oral argument, the *Fisher* majority opinion did not define “critical mass” or rely on the concept in its ruling,⁹² and it did not posit any other external measure of diversity. The Court merely deferred to universities to define their educational missions and related benefits of diversity, and it directed lower courts to stringently review whether race-conscious admissions policies were necessary to attain those benefits.⁹³ The Court did name some of these educational benefits of diversity, including “lessening of racial isolation and stereotypes[,]”⁹⁴ and “enabl[ing] [students] to better understand persons of different races.”⁹⁵ These educational benefits, rather than “critical mass” itself, are the important takeaway from *Fisher*, as universities can draw from them in defining their educational missions.⁹⁶

Because “critical mass” is difficult to measure and assess reliably, this Article argues that it is merely a part of the compelling interest in diversity, not part of the narrow tailoring test for race-conscious admissions policies.⁹⁷ The next Part will analyze *Grutter* and *Fisher*’s narrow tailoring principles and illustrate that in spite of *Fisher*’s push for race-neutrality, the holistic

determine whether a critical mass is present or lacking.”). Available <http://www.utexas.edu/vp/irla/Documents/Amicus.Mountain.States.Legal.Foundation.pdf>

⁹¹ Cf. *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (holding that there is no judicially manageable standard to assess partisan gerrymandering of legislative districts).

⁹² The entire *Fisher* opinion only mentions the term “critical mass” twice. One such reference is at the beginning of Justice Kennedy’s majority opinion: “[UT] has committed itself to increasing racial minority enrollment on campus. It refers to this goal as a ‘critical mass.’” *Fisher* at 2415. The other reference just notes that UT concluded that it “lacked a ‘critical mass’ of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program.” *Id.* at 2416.

⁹³ See *supra* nn.4-6.

⁹⁴ *Id.* at 2418. See also *Grutter* at at 308 (holding that “substantial, important, and laudable educational benefits that diversity is designed to produce, include[e] cross-racial understanding and the breaking down of racial stereotypes.”).

⁹⁵ *Id.*

⁹⁶ See *infra* __

⁹⁷ See Harpalani, “Diversity Within Racial Groups,” *supra* n.36, at 485 (“critical mass .. is merely part of the definition of *Grutter*’s compelling interest, not part of the narrow tailoring test for race-conscious admissions policies.”). In its Fifth Circuit brief on remand, UT made a similar argument. See Brief of Appellees at 45, <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html> (“*Fisher* .. specifically—and correctly—framed her critical mass arguments as *compelling interest* arguments.”).

admissions policies espoused by the *Grutter* and *Fisher* Courts necessitate a level of race-consciousness, specifically to attain the educational benefits espoused in *Grutter* and *Fisher*.

II. HOLISTIC ADMISSIONS AND RACE-CONSCIOUSNESS

In addition to articulating the educational benefits of racial diversity as a compelling state interest, *Grutter* also laid out narrow tailoring principles for race-conscious admissions policies, and these were reaffirmed in *Fisher*.⁹⁸ *Grutter* held that “truly individualized consideration demands that race be used in a flexible, nonmechanical way.”⁹⁹ The requirements for individualized review¹⁰⁰ and for flexible use of race in conjunction with other factors¹⁰¹ are the hallmark of a constitutionally permissible race-conscious admissions policy: these features distinguished the *Grutter* plan from the automatic point system struck down in *Gratz v. Bollinger*.¹⁰²

Additionally, the Supreme Court’s embrace of the University of Michigan Law School’s holistic admissions plan in *Grutter*,¹⁰³ coupled with its rejection of the University’s undergraduate point system in *Gratz v. Bollinger*,¹⁰⁴ illustrates the relationship between race-conscious policies and the tangible, educational benefits of racial diversity. *Grutter*’s

⁹⁸ *Id.* at 2420 (“[I]t remains at all times the University’s obligation to demonstrate, and the Judiciary’s obligation to determine, that admissions processes “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”)(quoting *Grutter* at 337).

⁹⁹ *Grutter* at 337.

¹⁰⁰ *Grutter* at 336-37. (“When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke*, 438 U.S., at 318, n. 52, 98 S.Ct. 2733 (opinion of Powell, J.) (identifying the “denial ... of th[e] right to individualized consideration” as the “principal evil” of the medical school’s admissions program).”)

¹⁰¹ *Grutter* at 337 (“[T]he Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment ... [u]nlike the program at issue in *Gratz v. Bollinger* ... the Law School awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity.”).

¹⁰² *Id.* See also *supra* nn.16-17.

¹⁰³ See *supra* n.16.

¹⁰⁴ *Id.*

requirement for individualized, flexible consideration of race also goes hand in hand with its notion of “critical mass,” because unlike an automatic point system, such individualized, flexible review facilitates the admission of a “variety of viewpoints”¹⁰⁵ within racial groups.¹⁰⁶

However, this Article argues that these very requirements for individualized review and flexible consideration of race are in tension with *Grutter*’s other narrow tailoring principles: preference for race-neutral alternatives¹⁰⁷ and gradual phase-out of race-conscious admissions policies,¹⁰⁸ both of which were reinforced even more strongly in *Fisher*.¹⁰⁹ First, even if they

¹⁰⁵ See *supra* n.65 and accompanying text.

¹⁰⁶ See Harpalani, *supra* n.36, at 494-95 (discussing how *Grutter*’s narrow tailoring principles facilitate diversity within racial groups in an admitted class).

¹⁰⁷ *Grutter* at 339 (“Narrow tailoring does ... require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

¹⁰⁸ *Grutter* at 342 (“[R]ace-conscious admissions policies must be limited in time. ... [i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”). Justice O’Connor’s majority opinion also stated:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. *Id.* at 343.

In the aftermath of *Grutter*, there was much scholarly debate on *See, e.g.,* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 201 (2003) (arguing that *Grutter* majority opinion warns universities to phase out race-conscious admissions policies within 25 years or have courts invalidate them); Boyce F. Martin Jr., *Fifty Years Later, It’s Time to Mend Brown’s Broken Promise*, 2004 U. ILL. L. REV. 1203, 1219 (arguing that *Grutter*’s 25 year prediction for end of race-conscious admissions was aspirational rather than binding.); Joel K. Goldstein, *Justice O’Connor’s Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83, 83 (2006) (arguing that “the twenty-five year expectation is problematic to the extent that it is understood as imposing a definite endpoint.”). *But see* Sheryl G. Snyder, *A Comment on the Litigation Strategy, Judicial Politics and Political Context which Produced Grutter and Gratz*, 92 KY. L.J. 241, 260 (2004) (viewing *Grutter*’s 25 year prediction as a binding end point for race-conscious admissions.).

Nevertheless, both parties in *Fisher* agreed that the 25 year period was not a binding time limit. *See* Transcript of Oral argument at 11, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345) (Plaintiff’s counsel Bert Rein answering “No, I don’t” to Justice Scalia’s question, “do you think that *Grutter* held that there is no more affirmative action in higher education after 2028?”); *Id.* at 50 (UT counsel Gregory Garre noting that “we don’t read *Grutter* as establishing that kind of time clock.”). At the *Fisher* oral argument, Justices Antonin Scalia and Stephen Breyer at least hinted that the 25 year period was legally significant. *Id.* at 49 (Justice Scalia stating that *Grutter* “holds for ... only ... sixteen more years[.]”); *Id.* at 8 (Justice Breyer noting that “*Grutter* said it would be good law for at least 25 years[.]”). Later in oral arguments, Justice Breyer stated that he “agree[d] it might” be the holding of *Grutter* that there can be no race-conscious admissions policies after 2028. *Id.* at 11. However, Justice O’Connor also later suggested that 25 years was not a binding time limit on race-conscious admissions. *See* Sandra Day O’Connor & Stewart J. Schwab, *Affirmative Action in Higher Education over the Next Twenty-Five Years: A Need for Study and Action*, in *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa* 58 (in David L. Featherman, Martin Hall & Marvin Krislov, eds., 2010) (stating “that 25-year expectation is, of course, far

can attain similar numbers of minority students, race-neutral alternatives do not allow the nuanced consideration of race that the diversity interest entails. *Bakke*, *Grutter*, and *Fisher* all proclaimed that the “state interest that would justify consideration of race or ethnic background ... is not an interest in simple ethnic diversity” that is served when “a specified percentage of the student body ... [are] members of selected ethnic groups[.]”¹¹⁰ Second, even if race-neutral alternatives could somehow achieve nuanced racial diversity beyond the numbers, it is still exceedingly difficult to eliminate race from a holistic admissions process with individualized review.¹¹¹ Third, universities are already placing a de facto limit on race-conscious admissions, based on their academic selectivity. Most universities would like more racial diversity, but they are only willing to compromise their academic selectivity to a certain extent.

A. Individualized Review and Race-Neutral Alternatives

Bakke, *Grutter*, and *Fisher* all stated that the compelling interest in diversity “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”¹¹² Race can only be used “as one of many ‘plus factors’” to determine “the overall individual contribution of each candidate.”¹¹³ Holistic, individualized review is thus necessary thoroughly consider all of the contributions of each applicant, not just race.

On a general level, percentage plans such as Texas’s Top Ten Percent Law compromise this feature by automatically admitting applicants, based on high school rank, without any further review of their applications. UT was compelled by the Texas legislature to adopt such an

from binding on any justices who may be responsible for entertaining a challenge to an affirmative-action program in 2028.”).

¹⁰⁹ See text accompanying *supra* nn.4-6.

¹¹⁰ *Bakke* at 315; *Grutter* at 324; *Fisher* at 2418.

¹¹¹ See *infra* Part __. See also Harpalani, “*Fisher’s* Fishing Expedition,” *supra* n.__ at 69-72.

¹¹² *Fisher*, 133 S.Ct. at 2418; *Grutter*, 539 U.S. at 324-25 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., concurring)).

¹¹³ *Fisher* at 2416.

admissions plan, thus leading to the *Fisher* case. There is no authority to suggest that courts—as opposed to state legislatures—can compel public universities to accept such percentage plans as adequate race-neutral alternatives. In fact, *Grutter* explicitly rejected percentage plans, such as the Top Ten Percent Law, as adequate race-neutral alternatives, because:

even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.¹¹⁴

Fisher did not abrogate or even address this aspect of *Grutter*; it merely remanded the suit for more stringent review. Even if, on remand, the lower courts find the Top Ten Percent Law to be an adequate race-neutral alternative which serves the compelling interest in diversity, this would only occur because UT had already adopted the plan. It would not suggest that courts could compel other universities to adopt a similar plan, because doing so would compromise other, non-racial aspects of diversity which are also vital to the compelling interest upheld in *Grutter*.¹¹⁵

For similar reasons, *Grutter* also rejected other race-neutral alternatives as adequate substitutes for race-conscious policies. The *Grutter* majority rejected lottery admissions plans, which would randomly admit applicants from a pool, even if they could achieve sufficient racial diversity—because they “would make ... nuanced judgment impossible ... [and] ... would effectively sacrifice all other educational values, not to mention every ... kind of diversity” other than representation of racial groups.¹¹⁶ Similarly, *Grutter* stated that “lower admission standards

¹¹⁴ *Grutter* at 340. The *Grutter* majority also questioned how percentage plans could work for admission to graduate and professional schools. *Id.* (noting failure to explain how “‘percentage plans,’ recently adopted by public undergraduate institutions in Texas, Florida, and California, to guarantee admission to all students above a certain class-rank threshold in every high school in the State ... could work for graduate and professional schools.”).

¹¹⁵ See *supra* nn.112-114 and accompanying text.

¹¹⁶ *Grutter* at 340.

for all students” would be a “drastic remedy” and would entail “sacrifice [of] a vital component of ... educational mission.”¹¹⁷

Individualized review facilitates aspects of the compelling interest in diversity and other educational values which are precluded by many race-neutral alternatives, even if those alternatives admit sufficient numbers of minority students. Perhaps even more significantly, the educational benefits of diversity articulated in *Grutter* also necessitate flexible, individualized consideration of race itself.

B. Flexible, Individualized Consideration of Race

In addition to individualized review generally, *Grutter* specifically highlighted flexible, individualized consideration of race. The main feature that distinguished the *Grutter* plan from the one struck down in *Gratz* was that the University of Michigan Law School considered race in a flexible, individualized manner—different for each applicant—rather than in a mechanical fashion of the LSA policy, where exactly the same number of points were awarded to all minority applicants. *Grutter* further underscored this point when it noted that the compelling interest in diversity included “breaking down racial stereotypes” and having a “variety of viewpoints” within each racial group.¹¹⁸ Universities can only pursue this variety of perspectives through flexible, individualized review of applicants, based on the discretion of admissions officers.¹¹⁹

At the *Fisher* oral argument, Solicitor General Donald Verrilli, arguing in support of UT’s policy, underscored these specific educational benefits noted in *Grutter*:

¹¹⁷ *Id.*

¹¹⁸ *Grutter* at 330 (“[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”). *See also* Harpalani, *supra* n.36, at 477 (arguing that “critical mass refers to a sufficiently diverse group of perspectives within each racial group to actualize the educational benefits of diversity.”).

¹¹⁹ *See* Carbado, *supra* n.32, at 1156 (“[I]ndividualized review enables [discretion] ... admissions officials have significant leeway to make ... choices between and among students within the same racial group.”). Professor Carbado also discusses various criteria that admissions officers could use to make such choices. *Id.* at 1147-58.

universities ... are looking ... to make individualized decisions about applicants who will directly further the education mission ... [f]or example, they will look for individuals who will play against racial stereotypes ... [t]he African American fencer; the Hispanic who has ... mastered classical Greek.¹²⁰

The Supreme Court's *Fisher* opinion described the compelling interest in diversity in terms of "lessening ... racial stereotypes" and also deferred to universities on their educational missions, which can readily incorporate this goal.¹²¹ Under *Grutter* and *Fisher*, so long as universities can provide a "reasoned, principled explanation" for seeking to admit individuals who defy racial stereotypes, courts should defer to their judgment and allow them to use race-conscious admissions policies, as necessary, to achieve this goal.¹²² *Grutter* and *Fisher* both already provide such a reasoned, principled explanation.¹²³ Thus, General Verrilli's argument ties together the compelling interest (breaking down racial stereotypes) and narrow tailoring (flexible, individualized consideration of race) prongs of *Grutter* and *Fisher*. Such a linkage is the hallmark of a constitutionally viable race-conscious admissions policy.

Moreover, there is no race-neutral alternative that will allow identification of African American fencers or other individuals who explicitly defy racial stereotypes: by definition, any admissions policy that seeks to do so will have to consider race. Proxy measures such as socioeconomic status may be correlated with race, but standing alone, they will not allow universities to identify individuals who defy racial stereotypes. Until racial stereotypes

¹²⁰ Transcript of Oral argument at 60, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345). See also Carbado, *supra* n.32, at 1181 ("Solicitor General Verrilli's response to Justice Alito highlights how the University of Texas might have made intraracial diversity a more central concern in the litigation."). This Article deals more with intraracial diversity in Part III.B.

¹²¹ *Fisher*, 133 S.Ct. at 2419 ("According to *Grutter*, a university's 'educational judgment that ... diversity is essential to its educational mission is one to which we defer.' *Grutter* concluded that the decision to pursue 'the educational benefits that flow from student body diversity,' ... that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*. A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision. On this point, the District Court and Court of Appeals were correct in finding that *Grutter* calls for deference to the University's conclusion, 'based on its experience and expertise,' ... that a diverse student body would serve its educational goals.'").

¹²² *Id.*

¹²³ See *supra* n.118-121 and accompanying text.

themselves no longer exist, race-conscious policies will be needed to identify individuals who help break them down—and there is no reason to believe that racial stereotypes are going away any time soon.¹²⁴

General Verrilli’s argument illustrates precisely why race-conscious admissions policies remain viable after *Fisher*. Courts might still inquire whether proxy measures, such as socioeconomic status, attendance at particular schools, family characteristics, or geographic criteria, might serve to produce sufficient racial diversity within student bodies. Unlike percentage plans and lotteries, using these measures does not compromise individualized review of applicants: in fact, they are already included by universities in the individualized assessment of diversity, as potential “plus” factors in addition to race.¹²⁵ Whether use of these non-racial factors alone would produce sufficient numerical racial diversity is an empirical question: studies suggest that it would not,¹²⁶ although this may vary by locality.¹²⁷ Nevertheless, even if these

¹²⁴ See Vinay Harpalani, *Racial Stereotypes and Achievement-Linked Identity Formation during Adolescence: An Investigation of Athletic Investment and Academic Resilience* (2005, August) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with Van Pelt Library, University of Pennsylvania) (noting continuing prevalence and salience of racial stereotypes—particularly of stereotypes of Black Americans related to intelligence and athletic abilities.).

¹²⁵ See *supra* nn.112-113 and accompanying text.

¹²⁶ See, e.g., Thomas J. Espenshade & Alexandria Walton Radford, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 356 (2009) (“Without a doubt, class-based preferences cannot achieve the same ends as racial affirmative action.”); Thomas J. Kane, *Race and Ethnic Preferences in College Admissions*, in THE BLACK-WHITE TEST SCORE GAP 431, 448 (Christopher Jencks & Meredith Phillips, eds.) (“[C]lass is a very poor substitute for race for selective colleges seeking racial diversity.”); Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA’S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 101, 153 (Richard D. Kahlenberg ed., 2004) (“[I]ncome-based policies are not an effective substitute for conscious racial and ethnic enrollment targets.”); Julie J. Park, Nida Denson and Nicholas A. Bowman, *Does Socioeconomic Diversity Make a Difference? Examining the Effects of Racial and Socioeconomic Diversity on the Campus Climate for Diversity*, 50 AMERICAN EDUCATIONAL RESEARCH JOURNAL 466, 467 (2013) (finding “that both socioeconomic and racial diversity are essential to promoting a positive campus racial climate and that racial and socioeconomic diversity, while interrelated, are not interchangeable.”). See also works cited in *supra* n.77.

¹²⁷ See Richard D. Kahlenberg, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences* 26-61, <http://tcf.org/assets/downloads/tcf-abaa.pdf> (discussing impact of state university bans on race-conscious admissions policies on minority student enrollment). Mr. Kahlenberg finds that through a combination of recruitment and use of socioeconomic criteria and proxies for race as admissions factors, universities in Washington, Florida, Georgia and Nebraska have been able to recover to prior levels of Black and Latina/o enrollment, after experiencing initial drops in minority enrollment after bans on race-conscious admissions. However, it is unclear how much this recovery is due to demographic changes in the state (particularly the growing Latina/o populations), rather than the efficacy of race-neutral alternatives. Additionally, state universities in Washington and Nebraska had

non-racial factors did by themselves significantly increase the numbers of minority students, they would still not fully serve the compelling interest in diversity articulated in *Grutter* and *Fisher*.¹²⁸ Using such proxy measures may allow universities to rely less on race, but for specific and nuanced identification of individuals who defy racial stereotypes, it is—by definition—also necessary to consider race itself.

C. What Does “Race-Neutral” Really Mean in an Admissions Process?

Holistic admissions policies implicate other questions that relate to the very legal definitions of race-consciousness and race-neutrality. The *Fisher* Plaintiffs raised one such issue with their claim that race was too small of an admissions factor at UT to serve the diversity interest. A related issue—one that courts will likely have to deal with—is whether race can ever be completely removed from a holistic admissions plan. Both of these issues speak to the importance of race-consciousness.

1. Can Race Be Too Small of A Factor to Serve the Diversity Interest?

In *Fisher*, the Plaintiffs actually claimed that race had “an infinitesimal impact” on UT admissions:¹²⁹ too small to be constitutional because it did not contribute enough to the educational benefits of diversity.¹³⁰ The Plaintiffs argued that “UT is unable to identify any

low numbers of Black and Latina/o students even before enacting their bans (owing to the low percentage of minorities in the state population overall); recovery using recruitment and race-neutral factors in those states did not require much. Moreover, in 15 years, the flagship public universities in California (UC Berkeley and UCLA) have not recovered to the levels of minority enrollment that they had before California’s ban on race-conscious admissions, in spite of a significant increase in the minority population of California. Also, it appears that proscription of race-conscious admissions policies may have a larger impact on more elite universities that draw a national student body.

¹²⁸ *Fisher* at 2418 (noting that compelling interest is “not an interest in simple ethnic diversity ... [but rather] ... encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”).

¹²⁹ See Brief of Petitioner at 38-39, *Fisher v. Texas*, No. 11-345 (U.S. May 21, 2012), available at <http://www.utexas.edu/vp/irla/Documents/Fisher%27s%20Merits%20Brief%205%2021%202012.pdf>. (arguing that “admissions statistics confirm that [UT’s] decision to classify ... applicants by race has ‘had an infinitesimal impact on critical mass in the student body as a whole.’”).

¹³⁰ *Id.* at 38-39 (arguing that “where racial classifications have only a ‘minimal impact’ in pursuing a compelling interest, it ‘casts doubt on the necessity of using racial classifications’ in the first instance ... [.]”)(citing *Parents Involved*, 551 U.S. at 734.). See also Ayres and Foster, *supra* n.53, at 517, 523 n.27 (“At least as a theoretical

students who were ‘ultimately offered admission due to their race who would not have otherwise been offered admission.’¹³¹ There was a dispute (ultimately unresolved) about whether UT’s race-conscious policy actually led to the admission of any minority students who would not have been admitted absent the use of race.¹³² In any case, however, there were flaws with the *Fisher* Plaintiff’s arguments.

First, *Grutter* actually contemplated that admission of small numbers of applicants who defy racial stereotypes would facilitate the educational benefits of diversity: Solicitor General Verrilli articulated this stance at the *Fisher* oral argument.¹³³ A small number of minority students can meaningfully impact diversity on campus: they may form student organizations and

matter, narrow tailoring requires not only that preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest.”). Justice Kennedy asked Plaintiff’s counsel, Bert Rein, “[W]hat’s the problem” with the “University’s race-conscious admission plan ... [admitting] ... too few minorities” and noting that he “had trouble with that [argument] reading the brief.” See Transcript of Oral argument at 22, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345). Justice Kennedy then answered his own question by suggesting that UT “shouldn’t impose this hurt or injury [of using race] ... for so little benefit[,]” and Mr. Rein agreed. *Id.* at 23.

¹³¹ See Brief of Petitioner at 38-39, *Fisher v. Texas*, No. 11-345 (U.S. May 21, 2012), available at <http://www.utexas.edu/vp/irla/Documents/Fisher%27s%20Merits%20Brief%205%2021%202012.pdf>. But see Transcript of Oral argument at 63, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345) (Chief Justice Roberts asking the Solicitor General if he “agree[s] that [race] makes a difference in some cases[,]” to which the Solicitor General responded “[y]es, it does.”).

¹³² See also Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. EN BANC 113, 115 (2012) (“*Fisher* does not claim that racial consideration ... necessarily doomed her prospects. No evidence supports that position. The record shows that a total of 216 black and Latino applicants gained acceptance to UT through holistic review in 2008, when *Fisher* unsuccessfully applied to UT. The plaintiff concedes that race played no role in the admission of 183 of those 216 students ... [t]he record is inconclusive on whether [the remaining] thirty-three black and Latino students benefitted from race.”). But see *Fisher*, 133 S.Ct. 2411 (2013) (Thomas, J., dissenting) (“In the University’s entering class of 2009 ... among the students admitted outside the Top Ten Percent plan, blacks scored at the 52d percentile of 2009 SAT takers nationwide, while Asians scored at the 93d percentile. Brief for Richard Sander et al. as *Amici Curiae* 3–4, and n. 4. Blacks had a mean GPA of 2.57 and a mean SAT score of 1524; Hispanics had a mean GPA of 2.83 and a mean SAT score of 1794; whites had a mean GPA of 3.04 and a mean SAT score of 1914; and Asians had a mean GPA of 3.07 and a mean SAT score of 1991.”).

Nevertheless, even the *Fisher* Plaintiffs contended that these disparities did not necessarily make a difference in the admission of any students. The data cited by Justice Thomas combined both the race-neutral (Academic Index) and race-conscious (Personal Academic Index) components of UT’s holistic admissions policy. See *supra* Part II.A.3. Moreover, similar academic disparities existed for students admitted via the race-neutral Top Ten Percent Law. For the UT entering class of 2009, among students automatically admitted via the Top Ten Percent Law, White students (n=2508) had a mean SAT score of 1864; African American students had a mean SAT score of 1584; Asian American students had a mean SAT score of 1874; and Hispanic students had a mean SAT score of 1628. Univ. of Tex. Off. of Admissions, Implement. and Results of Tex. Aut. Admissions Law, (HB 588) at Univ. of Texas, Sec. 1: Demographic Analysis of Entering Freshmen, Fall 2010, at 14, <http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf>

¹³³ See *supra* n.120 and accompanying text.

sponsor events related to diversity, or they may increase representation in majors and programs where minority students are especially underrepresented.¹³⁴ In fact, the whole point of a holistic admissions policy with individualized review is to identify applicants who will have a significant individual impact on the educational benefits of diversity.¹³⁵

Moreover, even if courts read the diversity interest more narrowly, there are other practical problems with the *Fisher* Plaintiffs' contention that a race-conscious admissions policy can have too small of an impact. It is the impact of race that ultimately must be detected to enforce any proscription on the use of race.¹³⁶ If the impact is too small to be detected, then there can be no enforcement of such a proscription. This raises another important question about holistic admissions plans: can race ever be completely removed?

2. Can Race be Completely Removed From a Holistic Admissions Plan?

Even if the Supreme Court proscribed race-conscious policies, by overturning *Grutter*, would race be eliminated from the admissions process? Consider another "race-neutral" alternative that universities might use: personal statements and diversity essays, rather than the separate and explicit consideration of race on applications. In practice, this would mean that applicants would no longer check a box that identifies their racial background—or at least that information from any such checked box is not used in the admissions process. Such an

¹³⁴ See Harpalani, *supra* n.36, at 532-33 ("It is possible that a race-conscious policy that admits only a small number of minority students can have a meaningful, unique impact if those students add to the diversity of viewpoints and experiences in a manner beyond the race-neutral policy. The admission of even small numbers of African American and Latina/o students from certain majors, or from more competitive schools, would be justifiable if minority students in those majors were not admitted sufficiently via [Texas's] Top Ten Percent Law, as would the admission of small numbers of Native American students via a race-conscious admissions policy.").

¹³⁵ See text accompanying *supra* nn.120-128.

¹³⁶ See RICHARD H. SANDER & STUART TAYLOR, MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 158 (2012) (contending that after Proposition 209 (California's constitutional ban on race-conscious policies) was passed in 1996, faculty in University of California system "spoke of the feasibility of evasion" for "small programs," where "[t]he number of students was so small, and the criteria for selection so subjective, that outside investigators could not easily detect racial discrimination."). Professors Sander and Taylor also note that "[f]or larger programs, such as law schools or business schools, that would obviously be more difficult." *Id.*

admissions policy is holistic and *Grutter*-like in every way, except that there is no explicit consideration of race as a “plus” factor.

However, applicants could articulate their potential contributions to diversity (including their racial backgrounds) in a separate essay or personal statement. Holistic admissions policies typically involve such essays and personal statements, regardless of whether race is an explicit admissions factor. At the *Fisher* oral argument, Chief Justice Roberts noted the fact that “race is the only one of [UT’s] holistic factors that appears on the cover of every application.”¹³⁷ But even if race did not “appear on the cover of every application,” it may be discerned in other ways—via not only an applicant’s personal statement and essays, but also through student group membership (in groups such as the Black Student League), and other sources on the application,¹³⁸ including names which are highly correlated with racial group membership.¹³⁹

Moreover, as Justice Ruth Bader Ginsburg has warned, even if admissions committees are forbidden from considering race as discerned through these criteria, they may do so surreptitiously—through “winks, nods, and disguises”¹⁴⁰—or even unconsciously.¹⁴¹ A holistic

¹³⁷ Transcript of Oral argument at 53, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345).

¹³⁸ See *supra* n.150, and accompanying text.

¹³⁹ See Roland G. Fryer & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 *Quarterly Journal of Economics* 767 (2004); *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting)(noting that without affirmative action, “applicants may highlight ... Hispanic surnames ... [.]”).

¹⁴⁰ See *Gratz v. Bollinger*, 539 U.S. 244, 304-5 (Ginsburg, J., dissenting)(“One can reasonably anticipate ... that colleges and universities will seek to maintain their minority enrollment ... whether or not they can do so in full candor through adoption of affirmative action plans ... [w]ithout recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers’ recommendations may emphasize who a student is as much as what he or she has accomplished ... [i]f honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”). Justice Ginsburg reiterated this concern in her *Fisher* dissent. *Fisher* at 24 33 (Ginsburg, J., dissenting) (“As for holistic review, if universities cannot explicitly include race as a factor, many may ‘resort to camouflage’ to ‘maintain their minority enrollment.’”). See also *Gratz* at 298 (Souter, J., dissenting) (“Equal protection cannot become an exercise in which the winners are the ones who hide the ball.”).

¹⁴¹ See Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 *CAL. L. REV.* 1139, 1146 (2008) (exploring unconscious racial biases in admissions and raising “the question of whether race can in fact be eliminated from admissions processes.”); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of*

admissions plan inherently considers race, even if there is no explicit “plus” factor allowed, because race come into play through essays and other factors that are considered. Even if UT’s race-conscious policy is struck down on remand in *Fisher*, or even if the Supreme Court banned the use of race as a plus factor, admissions committees could still use racial information surreptitiously. Large scale race-conscious policies might be detectable statistically: in both *Bakke* and *Grutter*, the Plaintiffs submitted statistical evidence of disparities in grades and test scores between admitted minority and non-minority students.¹⁴² But no such evidence was presented in *Fisher*, and the Plaintiffs themselves claimed that UT could not “identify any students who were ‘ultimately offered admission due to their race who would not have otherwise been offered admission.’”¹⁴³

Thus, even if UT does not endorse such use of race, individual reviewers may still be aware of applicants’ racial background, and would be able to use this information.¹⁴⁴ Under *Grutter*, the use of race in holistic admissions is already required to be flexible and discretionary:¹⁴⁵ individual reviewers decide whether to consider and applicant’s race and how

Affirmative Action as Diversity Management At UC-Berkeley, UT-Austin, and UW-Madison, 32 L. & SOC. INQUIRY 985, 1015 (2007) (noting that “the line between race-based and race-blind policy making can be quite blurry.”).

¹⁴² See *Bakke* at 277 n.7 (comparing Plaintiff Alan Bakke’s GPA and MCAT scores with those of all admitted applicants and those admitted via the special admissions program); See *Grutter v. Bollinger*, 137 F.Supp.2d 821, 838 (E.D.Mich.,2001)(*overruled* 539 U.S. 306(2003))(Plaintiffs’ expert witness concluding that “that ‘[a]ll the graphs comparing Native American, African American, Mexican American, and Puerto Rican applicants to Caucasian American applicants show wide separation indicating a much higher probability of acceptance for the particular ethnic group at a given selection index value.’”). But see Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L.Rev. 1045, 1049 (2002) (cited in *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting))(“In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.”).

¹⁴³ See Brief of Petitioner at 38-39, *Fisher v. Texas*, No. 11-345 (U.S. May 21, 2012), available at <http://www.utexas.edu/vp/irla/Documents/Fisher%27s%20Merits%20Brief%205%2021%202012.pdf>. See also *supra* Part I.A.1.

¹⁴⁴ See *supra* nn.138-141 and accompanying text.

¹⁴⁵ See *Grutter* at 337 (“[T] he [University of Michigan] Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either de jure or de facto, of automatic acceptance or rejection based on any single ‘soft’ variable.”).

much weight to give it.¹⁴⁶ It is very likely that some individual reviewers will desire to an increase in racial diversity in the undergraduate student body. Even if it is not “on the cover of every application[,]”¹⁴⁷ race could still be a factor in UT admissions.¹⁴⁸

In fact, such accusations of “winks, nods, and disguises” arose in California, where the state constitution bans explicit consideration of race in public education.¹⁴⁹ The University of California system still uses admissions essays and personal statements, where applicants can elaborate on their life experiences, contributions to diversity, and potentially identify their racial backgrounds¹⁵⁰ In August 2008, Professor Tim Groseclose of the University of California at Los Angeles (UCLA) authored an 89 page report. Professor Groseclose accused university admissions committee members of using applicant personal statements and other sources of information to give preferential treatment to minority applicants (specifically African

¹⁴⁶ This point came up in oral arguments when Justice Scalia asked Solicitor General Donald Verrilli that if two applicants “are identical in all other respects ... what does the racial preference mean if it doesn’t mean that in that situation the minority applicant wins and the other applicant loses?” Transcript of Oral argument at 62, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345). Mr. Verrilli responded that “[t]here may not be a racial preference in that situation. It’s going to depend on a holistic, individualized consideration of the applicant.” *Id.* Justice Kennedy seemed dismayed, stating that he “thought that the whole point is that sometimes race should be a tie-breaker ... [and]... if it isn’t ... then we should just say you can’t use race ... [.]” *Id.* Mr. Verrilli responded that “[race] functions more subtly than that [.]” *Id.*

¹⁴⁷ Transcript of Oral argument at 53, *Fisher v. Texas*, 133 S.Ct. 2411 (2013)(No. 11-345).

¹⁴⁸ Of course, it may cost more for universities to review applications if race is not on the cover. However, universities have adjusted to similar cost increases in the past. See Harpalani, *supra* n.36, at 532 n.309 (“[C]olleges and universities have adjusted to similar circumstances in the past: after *Grutter*, institutions had to expend more resources on holistic admissions and eliminate more cost-effective point systems similar to the one struck down in *Gratz*. See *Gratz*, 539 U.S. at 275 (“Respondents contend that ‘[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the . . . admissions system’ upheld by the Court today in *Grutter* . . . But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.”) (internal citation omitted)).

¹⁴⁹ Cal. Const. art. 1, § 31(a) (“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

¹⁵⁰ See UC Berkeley Freshman Selection Process, <http://students.berkeley.edu/admissions/freshmen.asp?id=56&navid=N> and <http://admissions.berkeley.edu/personalstatement> (application and personal statement weblinks for the University of California at Berkeley). Prompt #1 for freshman applicants is “[d]escribe the world you come from—for example, your family, community or school—and tell us how your world has shaped your dreams and aspirations.” *Id.* Applicants can readily allude to their racial background in response to this prompt, and members of underrepresented minority groups can self-identify here.

Americans), in defiance of California constitutional proscription.¹⁵¹ Groseclose contended that this practice could likely lead to future litigation.

Whether surreptitious use of race would be widespread enough to prompt litigation in a post-*Grutter* regime is an open question.¹⁵² If so, it would be even more messy than litigation under *Grutter*. Universities would not admit to intentionally using race in admissions—as they did in *Bakke*, *Hopwood*, *Gratz*, *Grutter*, and *Fisher*—because doing so would definitively be admission of a constitutional violation. Indeed, universities may not be aware when individual reviewers do so, or to what extent. They may deliberately ignore the practice or even covertly encourage it.

The only way to detect large scale use of race in such an admissions plan is to conduct statistical analysis of academic disparities between applicants of different racial backgrounds. Moreover, the lack of intent would pose a well-known conundrum for equal protection doctrine: that it only addresses intentional uses of race, not policies or admissions procedures that just

¹⁵¹ Tim Groseclose, *Report on Suspected Malfeasance in UCLA Admissions and the Accompanying Cover-up*, August 28, 2008, <http://images.ocregister.com/newsimages/news/2008/08/CUARSGrosecloseResignationReport.pdf>. One article on the UCLA controversy was entitled “Is ‘Holistic Admissions’ a Cover for Helping Black Applicants?” See <http://www.insidehighered.com/news/2008/09/02/ucla>. Others, such as anti-affirmative action organizer Ward Connerly, have also accused the UC system of using race informally. See Lipson, *supra* n.141, at 1015 (noting that “Ward Connerly . . . put forth and later partially retracted accusations that the admissions officials at UC-Berkeley were ‘slipping’ race in through the back door via individual assessment (e.g., by preferring applicants from school districts that are predominantly African American or Hispanic, by preferring applicants with names that are predominantly African American or Hispanic, and/or by preferring applicants who identify or give clues that they are African American or Hispanic in their personal statements.”); See also Sander & Taylor, *supra* n.136, at 169 (contending that as of 2012, “the University of California system is still, formally race-neutral, but in practice it has come very close to a form of racial proportionality.”); *id.* at 170 (“[N]either voters nor state officials can end university racial preferences by a single stroke.”).

¹⁵² Justice Antonin Scalia contended that *Grutter* would invite more litigation. See *Grutter* at 348 (Scalia, J., dissenting) (“Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today’s *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.”). While he may have been correct, Justice Scalia’s assertion that striking down race-conscious policies would end litigation is off base: that is an open question as yet untested.

Ironically, in spite of their vast ideological differences, Professor Derrick Bell agreed with Justice Scalia that *Grutter* would lead to more litigation. See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003) (“Diversity invites further litigation by offering a distinction without a real difference between those uses of race approved in college admissions programs, and those in other far more important affirmative action policies that the Court has rejected[.]”); *id.* at 1631 (referring to race-conscious admissions policies as “litigation-prompting compensation for admissions criteria that benefit the already privileged and greatly burden the already disadvantaged.”).

have a disparate impact by race.¹⁵³ Plaintiffs would have a much higher burden in any such post-*Grutter* litigation: proving the intentional use of race. This would probably mean establishing that academic disparities between minority and non-minority applicants are “unexplainable on grounds other than race.”¹⁵⁴

In the context of a holistic admissions policy that incorporates socioeconomic status, personal hardship, and other factors that correlate with race and are often unquantified and not explicitly weighted, this would be a difficult inquiry. As Justice Souter had warned, equal protection could indeed become “an exercise in which the winners are the ones who hide the ball.”¹⁵⁵ The Supreme Court’s very mandate to embed race-consciousness in a flexible, holistic admissions process makes it more difficult to eliminate use of race completely. This is why *Fisher* itself was largely a “fishing expedition.”¹⁵⁶ Ultimately, absent a university’s admitted, intentional use of race in admissions, “race-conscious” and “race-neutral” can only be defined statistically—via detectable use of race in an admissions process. It makes no sense to “smoke out” statistically negligible use of race, whether or not it is intentional.

Of course, the Supreme Court’s quest to limit race-conscious admissions policies need not reach that far to curb race-conscious policies. Currently, for most universities, use of race is both intentional and statistically detectable.¹⁵⁷ Either the Supreme Court or lower courts can

¹⁵³ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (noting that the Supreme Court has “not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the Equal Protection Clause protects only against discrimination that occurs “because of, not merely in spite of, its adverse effects upon an identifiable group.”).

¹⁵⁴ *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 (1977) (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”).

¹⁵⁵ *Gratz* at 298 (Souter, J., dissenting). Of course, where there are state constitutional bans on race-conscious admissions policies, state courts could apply a different standard to allow disparate impact to serve as a basis for claims under those constitutional bans.

¹⁵⁶ See Harpalani, *Fisher’s Fishing Expedition*, *supra* n. ___, at 73 (arguing that “[t]he entire *Fisher* case may just be a fishing expedition[.]”).

¹⁵⁷ See text accompanying *infra* nn.164.

proscribe race-conscious policies of detectable magnitude, or they can limit the magnitude itself. Nevertheless, this Article argues that universities already place a de facto limit on their race-conscious admissions policies—below their desired level of racial diversity.

D. Limits on Race-Consciousness

Besides limits on the educational benefits of diversity, limits on the magnitude of race-consciousness itself—the weight of race in the admissions process—can also serve as a limiting principle on universities’ use of race. This could occur in either of two ways: courts could impose a limit on the weight of race in the admissions process, or universities’ desire to maintain academic selectivity, in terms of high grades and standardized test scores within their student bodies, could serve as a de facto limiting principle on their use of race as an admissions plus factor. This Article argues that the latter is the actual limiting principle.

1. Judicial Limits on the Weight of Race in the Admissions Process

Although they have not done so, courts could interpret *Grutter* to place an upper limit on the weight of race in the admissions process: such a limit would apply even if a university had not fully attained the educational benefits of diversity. The “stigmatic harm” of using race,¹⁵⁸ the constitutional burden on non-minority applicants,¹⁵⁹ or the purported harm to minority students (i.e., “mismatch” theory)¹⁶⁰ could serve as the constitutional justification for such a limit. Courts would limit how much of an admissions “plus” factor can race be, regardless of whether universities could attain greater educational benefits from more racially diverse student bodies.

The *Grutter* majority articulated two narrow tailoring provisions that seemingly refer to the

¹⁵⁸ See Harpalani, “Diversity Within Racial Groups,” *supra* n.36, at 487-489 (noting that “[i]n the Supreme Court’s recent race jurisprudence, stigmatic harm can be understood as the [constitutional] harm that occurs when a government policy reinforces racial stereotypes.”). This is different from specific, tangible harm to any individual. *Id.*

¹⁵⁹ See *Grutter* at 341 (“To be narrowly tailored, a race-conscious admissions program must not “unduly burden individuals who are not members of the favored racial and ethnic groups.”)(citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting)).

¹⁶⁰ See Sander & Taylor, *supra* n.136.

weight given to race in the admissions process: 1. Race cannot be the “predominant factor” in admissions;¹⁶¹ and 2. The race-conscious policy cannot “unduly burden” non-minority applicants.¹⁶²

However, *Grutter* did not elaborate on these provisions,¹⁶³ and there is no consistent weight given to race for individual applicants in a constitutional, holistic admissions plan: the weight could only be measured in aggregate, for an entire admitted class.¹⁶⁴ Using the weight for race as a limiting principle would be a difficult undertaking, for many of the same reasons that using a diversity limit is difficult. It would be tantamount to the cost-benefit analysis suggested by Professors Ayres and Foster,¹⁶⁵ and they acknowledge that “[i]t is difficult to quantify the burdens of racial preferences and even more difficult to quantify government interests in nonremedial affirmative action.”¹⁶⁶ Any determination of how much weight should be given to race—how much harm or burden should be allowed to attain the benefits of diversity—is contingent on value judgments on which there is a wide variety of opinion. Charged debates about these issues are unavoidable in resolving disputes about race-conscious admissions policies. If it comes to bear, political considerations and the ideological positions of judges, and

¹⁶¹ *Id.* at 393 (Kennedy, J., dissenting)(“There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure . . . that race does not become a predominant factor in the admissions decisionmaking.”). Because Justice O’Connor has retired and Justice Kennedy is now the swing vote on the Supreme Court, this provision from his *Grutter* dissent takes on greater significance.

¹⁶² *Id.* at 341 (“To be narrowly tailored, a race-conscious admissions program must not “unduly burden individuals who are not members of the favored racial and ethnic groups.”)(citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting).

¹⁶³ The *Grutter* majority did state that “in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.” *Grutter* at 341. However, the *Grutter* majority does not provide any general guidance here as to how an “undue burden” relates to the weight given to race in the admissions process.

¹⁶⁴ See Harpalani, *supra* n.36, at 528 n.289 and accompanying text. For methods of measuring “aggregate weight,” see, e.g., Ayres & Foster, *supra* n.53 (suggesting various ways of measuring weight of race in admissions); THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 92-93 (2009) (calculating values of race as a “plus” factor in terms of standardized test score enhancement at public and private institutions.).

¹⁶⁵ Ayres and Foster, *supra* n.130, at 580.

¹⁶⁶ *Id.* at 583.

ultimately of Justices on the Supreme Court, will likely be the main factor in determining the answer to the question of “how much.”

2. Universities’ Academic Selectivity as the De Facto Limiting Principle

Universities are already imposing their own de facto limits on race-conscious admissions. Most universities would like to have greater representation of racial minorities in their student bodies than they currently do. If universities are not enrolling a “critical mass” or fully attaining the educational benefits of diversity, what is the limiting principle on their actual use of race-conscious admissions policies? Other considerations, such as ensuring race does not become a “predominate factor” in admissions, or maintaining particular grade and standardized test scores, appear to limit universities’ race-conscious admissions policies before a critical mass itself is attained.¹⁶⁷

The latter is mostly likely to be the de facto limiting principle at elite institutions, where academic disparities between minority and non-minority applicants are the main reason that race is necessary as a “plus” factor. Professor Thomas Espenshade and Dr. Alexandria Walton report the magnitude of standardized test score differences between admitted minority and non-minority admitted applicants in their studies of public and private institutions.¹⁶⁸ For Fall 1997, in their sample of 7,410 accepted applicants at several selective private institutions, Professor Espenshade and Dr. Walton reported that compared to White admittees, race-related admissions plus factors were equivalent to 310 points (out of 1600 total) for Black admittees and 130 points for Hispanic admittees, while Asian admittees outscored Whites by 140 points.¹⁶⁹ If universities would like to have more racially diverse student bodies than they currently do, the most likely limiting factor is their own unwillingness to further compromise their standardized test scores in

¹⁶⁷ See Harpalani, *supra* n.36, at 480-83.

¹⁶⁸ Thomas J. Espenshade & Alexandria Walton Radford, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 92-93 (2009)

¹⁶⁹ See *id.* at 92-93, 412.

order to do so—since lower standardized test scores have consequences for universities’ academic reputations,¹⁷⁰ or perhaps because universities believe that students with lower grades and test scores would not be academically successful.¹⁷¹

As such, *Fisher* ignores the most significant reason that most universities use race-conscious admissions policies—because of differences on academic admissions criteria between minority and non-minority applicants. The “logical end point” of race-conscious admissions will occur when these differences no longer exist: at that point, universities will not need to use race as an admissions plus factor. Justice O’Connor implicitly acknowledged this reality in her *Grutter* opinion, even as she aspired to see an end to race-conscious admissions:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.¹⁷²

Justice O’Connor’s statement implies that the need for race-conscious admissions policies is at least in part contingent upon racial disparities on academic criteria. In spite of their vast ideological differences, both Justice Ginsburg and Justice Thomas acknowledged that racial disparities on academic criteria are the underlying reason why universities need to use race-

¹⁷⁰ See also *Grutter* at 355-56 (Thomas, J., dissenting) (“[T]he [University of Michigan] Law School seeks ... [to enroll a racially diverse student body] ... without sacrificing too much of its exclusivity and elite status.”). Justice Thomas also devoted one section of his *Grutter* dissent largely to critiquing the use of standardized tests in admissions. See *id.* at 367-71 (Thomas, J., dissenting). In spite of their vast ideological differences, Professor Derrick Bell agreed with Justice Thomas on this point and also employed it as a critique of the diversity interest. See Bell, *supra* n.152, at 1622 (“Diversity serves to give undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants[.]”).

¹⁷¹ See Sander & Taylor, *supra* n.136. Professors Sander and Taylor believe that universities compromise academic selectivity too much with their race-conscious admissions policies. Nevertheless, at some level, universities do likely accept Sander and Taylor’s “mismatch” theory, and they limit their race-conscious admissions policies accordingly.

¹⁷² *Grutter* at 343 (emphasis added).

conscious admissions policies, and they both questioned Justice O'Connor's aspiration that racial disparities on academic criteria could be eliminated by 2028.¹⁷³

Universities can thus argue that they need to continue using race-conscious admissions policies to attain the educational benefits of diversity, and that they actually stop short of fully attaining those benefits because of their interest in academic selectivity, or in ensuring that race does not become a predominant factor in admissions. So long as the Supreme Court does not require universities to choose between student selectivity and racial diversity, this will be a valid argument.¹⁷⁴

Of course, after *Fisher*, litigants may also raise questions about whether universities are actually attaining the educational benefits of diversity, which justify their use of race-conscious admissions policies. Universities face a greater burden to demonstrate these educational benefits in tangible fashion. The next Part examines two relatively novel strategies that universities could use to defend race-conscious admissions policies, taking advantage of the deference the Supreme Court has given them in by defining their educational missions. Universities can employ the broad nature of the diversity interest to pursue diversity within racial groups, and to promote race-conscious campus spaces—highlighting how both of these facilitate the educational benefits of diversity articulated in *Grutter* and *Fisher*.

¹⁷³ See *id.* at 346 (Ginsburg, J., concurring) (“[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country’s finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”); *Id.* at 375-76 (Thomas, J., dissenting) (“The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that timeframe. . . . No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years.”).

As noted earlier, Justice O'Connor herself later suggested that 25 years was not a binding time limit on race-conscious admissions, and both parties in *Fisher* agreed. See *supra* n.108.

¹⁷⁴ The *Grutter* majority held that universities do not have to compromise academic selectivity to attain racial diversity. See text accompanying *supra* n.117.

III. RACE-CONSCIOUSNESS AND UNIVERSITIES' EDUCATIONAL MISSIONS

This Article does not attempt to resolve the tension in Supreme Court's doctrine between the broad diversity interest and the call for race-neutrality. This tension is likely a result of compromises between various Justices on the Court,¹⁷⁵ in conjunction with the Court's need to maintain institutional legitimacy by adhering to precedent.¹⁷⁶ Eventually, the Court will have to make a choice. It will either have to curb the broad nature of the compelling interest in diversity, or it will have to accept the fact that for the foreseeable future, universities will need to use race-conscious admissions policies to attain that interest.¹⁷⁷

For now, however, this Article aims to advise universities on defending race-conscious admissions policies after *Fisher*. *Fisher*'s call for stringent review of the need for race-conscious admissions will likely spur further litigation to challenge race-conscious admissions.

Nevertheless, in light of the Supreme Court's broad definition of the compelling interest in diversity, universities can define their educational missions in a manner that justifies and necessitates their race-conscious admissions policies. The Supreme Court has given universities deference in this regard,¹⁷⁸ and this Article suggests two relatively novel ways that universities incorporate race-consciousness into their missions: 1. Emphasizing the educational benefits of diversity within racial groups and intragroup support among minority students; and 2.

Highlighting the educational benefits of diversity that occur within race-conscious campus spaces.

¹⁷⁵ See *supra* n.2.

¹⁷⁶ See Commentary on *Fisher*: In with a bang, out with a fizzle. Posting of Elise Boddie to SCOTUSblog, <http://www.scotusblog.com/2013/06/fisher-v-university-of-texas-in-with-a-bang-out-with-a-fizzle/>, June 24, 2013 ("Fisher may suggest that the Court has become concerned about its institutional legitimacy and, therefore, is now wary of issuing sweeping decisions that depart radically from precedent.").

¹⁷⁷ Of course, it is possible that the Supreme Court may not revisit this issue—if more state bans on affirmative action render it moot, or if universities stop using race-conscious admissions policies for other reasons. See *infra* n.186. Given the Court's rulings in *Fisher* and *Schuette*, the Justices may—at least for the time being—prefer to allow the political process to dismantle race-conscious programs rather than issuing a broad ruling to do so.

¹⁷⁸ *Fisher* at 2419 ("[A] university's 'educational judgment that such diversity is essential to its educational mission is one to which we defer.'")(quoting *Grutter* at 328).

A. Deference to Universities in Defining their Educational Missions

Deference to universities was the one issue resolved by the Supreme Court in *Fisher*. One might have expected this result, as Justice Kennedy's *Grutter* dissent contended that the *Grutter* majority "confuses deference to a university's definition of its educational objective with deference to the implementation of this goal,"¹⁷⁹ and the *Fisher* majority opinion was consistent with this view. The *Fisher* majority made clear that a "[u]niversity receives no deference" from the reviewing court on whether the "means chosen by the [u]niversity to attain diversity are narrowly tailored[.]"¹⁸⁰ *Fisher* called for "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications[.]"¹⁸¹ and this was the basis for vacating the Fifth Circuit opinion.¹⁸²

However, given the broad diversity interest espoused by the Court, *Fisher*'s deference to universities in determining their educational missions is just as significant.¹⁸³ The First Amendment provides the basis for judicial deference to universities in defining their educational missions. Justice Powell's *Bakke* opinion noted that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body[.]"¹⁸⁴ citing the last of Justice Felix Frankfurter's "four essential freedoms" that constitute academic freedom: "'who may be admitted to study.'" ¹⁸⁵ *Grutter* reinforced this idea, noting a "constitutional dimension,

¹⁷⁹ *Id.* at 388 (Kennedy, J., dissenting). Add bit from my article on deference

¹⁸⁰ *Fisher* at 2420.

¹⁸¹ *Id.*

¹⁸² *Id.* at 2421 ("The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis. ... [T]he Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.").

¹⁸³ *Fisher* at 2419 ("According to *Grutter*, a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer." [539 U.S., at 328, 123 S.Ct. 2325](#). *Grutter* concluded that the decision to pursue "the educational benefits that flow from student body diversity," *id.*, at 330, [123 S.Ct. 2325](#), that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*.").

¹⁸⁴ *Bakke* at 312.

¹⁸⁵ *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

grounded in the First Amendment, of educational autonomy[,]”¹⁸⁶ for universities. The *Fisher* majority noted that “the District Court and Court of Appeals were correct in finding that *Grutter* calls for deference to the University’s conclusion, “based on its experience and expertise,” “... that a diverse student body would serve its educational goals.”¹⁸⁷

Fisher did state that such judicial deference was “not complete”—that the “court ... should ensure that there is a reasoned, principled explanation for the [university’s] academic decision.”¹⁸⁸ Nevertheless, *Fisher* and *Grutter*’s articulation of the educational benefits of diversity, which include “lessening of racial isolation and stereotypes[,]”¹⁸⁹ “promot[ing] cross-

¹⁸⁶ *Grutter* at 329. It should be noted that this “constitutional dimension” is not a full-fledged First Amendment right, which would entail complete freedom from government intrusion absent a compelling interest. Deference to universities in choosing their student bodies is limited to the judiciary. State legislatures can pass laws which curb this “essential freedom.” Texas’s Top Ten Percent Law itself is a prime example: it automatically determines 80 percent of UT’s incoming class. *See supra* n.3 The executive branch can also curb race-conscious admissions policies; for example, Governor Jeb Bush did so in Florida in 1999. Florida Executive Order #99-281. New Hampshire’s state legislature passed a similar law effective in 2012. House Bill 0623 (2011).

Other states have also adopted percentage plans, and several states have passed popular constitutional amendments that proscribe race-conscious admissions policies. In addition to California and Florida, Washington, Michigan, Nebraska, Arizona, Oklahoma, have all passed state referenda banning such policies. *See* <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>. The Supreme Court recently upheld such state constitutional bans on race-conscious policies. *See Schuette v. Coalition to Defend Affirmative Action*. Prior to the passage of Proposition 209 in California in 1996, the University of California Regents had voted to eliminate race-conscious admissions policies in 1995—although this ban did not go into effect until 1998, after Proposition 209 itself had passed.

Thus, deference to universities does not imply that they have a constitutional right to choose their student bodies. *But see Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957)(Frankfurter, J., concurring)(“[D]ependence of a free society on free universities ... means the exclusion of governmental intervention in the intellectual life of a university. ... It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”). It is doubtful that courts would hold Justice Felix Frankfurter’s concurring opinion in *Sweezy* to establish the full-fledged constitutional right of a university to determine who is admitted to its student body, independent of any government intrusion. Rather, deference to universities appears to be a part of judicial balancing in the context of race-based equal protection. *See Grutter* at 362 (Thomas, J., dissenting)(“The Court bases its unprecedented deference to the Law School ... on an idea of “educational autonomy” grounded in the First Amendment[] ... [that] the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause.”).

¹⁸⁷ *Fisher* at 2419. *See also* Eboni S.Nelson, *In Defense of Deference: The Case for Respecting Educational Autonomy and Expert Judgments in Fisher v. Texas*, 47 U. RICH. L. REV. 1133 (2013).

¹⁸⁸ *Fisher* at 2419.

¹⁸⁹ *Id.* at 2418. *See also Grutter* at at 308 (holding that “substantial, important, and laudable educational benefits that diversity is designed to produce, include[e] cross-racial understanding and the breaking down of racial stereotypes.”); *Id.* at 319. (noting that “critical mass” entails ““numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.”).

racial understanding,”¹⁹⁰ and “enabl[ing] [students] to better understand persons of different races[,]”¹⁹¹ all suggest principled explanations for incorporating race-consciousness, in various forms, into a universities’ educational missions. Universities can define their educational missions in a manner that emphasizes these educational benefits of diversity and tie these benefits more directly to their race-conscious admissions policies.

B. Holistic Admissions and Diversity Within Racial Groups

In its Supreme Court brief and at the oral arguments in *Fisher*, UT raised the argument that its race-conscious admissions policy is necessary to attain diversity within racial groups.¹⁹² However, it did not elaborate on this idea or defend it very well.¹⁹³ UT did not link within-group diversity directly to the compelling interest in diversity or to holistic admissions and *Grutter*’s narrow tailoring requirements.¹⁹⁴ In the future, universities can do both of these, in order to defend their race-conscious admissions policies.

¹⁹⁰ *Grutter* at 330 (“[T]he educational benefits that diversity is designed to produce ... are substantial [and include] promot[ing] ‘cross-racial understanding,’ ... break[ing] down racial stereotypes, and ‘enabl[ing] [students] to better understand persons of different races.’”).

¹⁹¹ *Id.*

¹⁹² Brief of Respondents at 33, *Fisher v. Texas*, No. 11-345 (U.S. argued October 10, 2012). Available at <http://www.utexas.edu/vp/irla/Documents/Brief%20for%20Respondents.pdf>. (“Holistic review permits the consideration of diversity within racial groups.”)

¹⁹³ See Harpalani, *Fisher*’s *Fishing Expedition*, *supra* n. ___, at 63 (“UT had already built its argument about critical mass around classroom isolation of minority students: as a consequence, the reference to diversity within racial groups was cursory and seemed like a last-minute addition.”); Carbado, *supra* n.32, at 1179 (asserting that at the Supreme Court oral arguments in *Fisher*, there were “significant problems with the way in which the university’s counsel responded to ... questions about intraracial diversity.”).

Both Professor Devon Carbado and I have argued that diversity within racial groups can be part of the compelling interest upheld in *Grutter*, and we both elaborate on this idea in various ways. See Harpalani, *supra* n.36 and Carbado, *supra* n.32. Additionally, UT is elaborating on its argument in *Fisher* on remand. <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html>

¹⁹⁴ In its brief to the Fifth Circuit on remand, UT did begin to make the link between diversity within racial groups and the compelling interest. See Brief of Appellees at 48 (“Ensuring a diversity of backgrounds—within racial groups—is one of the best ways to help breakdown racial stereotypes and promote cross-racial understanding, and often students who come from integrated environments are particularly successful in bridging racial barriers. This is not news. The Harvard plan commended by the Supreme Court in *Bakke* itself recognized this added dimension of diversity. *Bakke*, 438 U.S. at 323-24.”). In spite of its pronouncement that “[t]his is not news[.]” UT did not initially incorporate the “diversity within racial groups” argument in its defense of race-conscious admissions: it raised the argument for the first time at the U.S. Supreme Court. See Brief of Appellants at 28 (“UT asserted for the first time before the Supreme Court that its failure to achieve critical mass is a qualitative—not quantitative—problem because its real concern is a lack of ‘diversity within racial groups.’ Resp. Br. at 33. But UT raised this argument for the first time at the Supreme Court. Naturally, then, there is nothing in the record demonstrating that UT relied on

1. Diversity Within Racial Groups as Part of the Compelling Interest

The idea of diversity within racial groups¹⁹⁵ as part of the compelling interest finds support in *Bakke*¹⁹⁶ and *Grutter*. Diversity within racial groups facilitates educational benefits such as the breakdown of racial stereotypes, and it also may help minority students feel less isolated on campus.

Grutter specifically articulates educational benefits related to within-group diversity. The *Grutter* majority opinion noted that one of the goals of a race-conscious admissions policy is to produce a “critical mass” of minority students with a “variety of viewpoints.”¹⁹⁷ Having such diversity within racial groups augments the educational benefits of diversity, such as breaking down racial stereotypes:

when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no “minority viewpoint” but rather a variety of viewpoints among minority students.¹⁹⁸

Grutter’s language thus suggests that “meaningful representation”¹⁹⁹ of minority students depends not only upon numbers of minority students, but also on sufficiently diverse

this interest when it reintroduced race in 2004 or retained it in 2007, or any evidence whatsoever supporting UT’s argument . . . [.]”).

¹⁹⁵ This Article uses the term “diversity within racial groups” interchangeably with “within-group diversity” and “intra-racial diversity.”

¹⁹⁶ See *Bakke* at 321 n.55 (Powell, J., concurring)(“[An] [a]dmissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa.”). Justice Powell gave this example when discussing the Harvard College Admissions Program. *Id.* The Court also cited Justice Powell’s example in its *Gratz* decision. *Gratz* at 272-73.

¹⁹⁷ *Grutter* at 320.

¹⁹⁸ *Id.* at 319-20. See also *id.* at 333 (“The Law School does not premise its need for critical mass on ‘any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.’ . . . To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.”). This language in *Grutter* speaks to the immediate, proximal impact of having a “critical mass.” .

¹⁹⁹ *Grutter* at 318.

perspectives within racial groups.²⁰⁰ Students with such different perspective help to break down racial stereotypes and facilitate the educational benefits of diversity—the constitutional justifications for race-conscious admissions policies in the first place. When understood in terms of these educational benefits, there is a strong argument that diversity within racial groups is part of the compelling interest in diversity.²⁰¹

Universities should study and document the educational benefits of diversity within racial groups. While there are many studies of the educational benefits of diversity, these generally do not focus on diversity within racial groups—and especially not on how such within-group diversity contributes to the compelling interest articulated in *Grutter*.²⁰² Various campus events, sponsored by students of color organizations and cultural centers on campus, involve debates and discussions that emphasize different within-group perspectives: for example, there are discussions about relations between African American and African or Afro-Caribbean students on campus, and within-group student coalitions that bring together various Black, Asian American, and Latina/o groups.²⁰³ White students and students from a variety of other ethnic

²⁰⁰ Of course, there cannot be sufficient within-group diversity if there are not adequate numbers of a particular minority group. However, no particular number or percentage of a given racial group automatically guarantees that within-group diversity is present. That is an assessment that institutions must make themselves.

²⁰¹ See Harpalani, *supra* n.36; Carbado, *supra* n.32, at ____.

²⁰² Professor Carbado notes that “[I]ntraracial selections take place ... with relatively little ... engagement on the part of scholars.” Carbado, *supra* n.32, at 1139. A few scholars have begun to study within-group diversity on college campuses in more depth. See, e.g., Charles, Camille Z., Kimberly C. Torres, and Rachelle J. Brunn, *Black Like Who? Exploring the Racial, Ethnic, and Class Diversity of Black Students at Selective Colleges and Universities*, in *RACISM IN POST-RACE AMERICA: NEW THEORIES, NEW DIRECTIONS* 247 (Charles A. Gallagher, ed., 2008).

²⁰³ For example, at the University of Pennsylvania, there is a coalition of various Black student groups called UMOJA (see <http://www.dolphin.upenn.edu/umoja/>); a coalition of various Latina/o student groups called the Latino Coalition (see <http://www.dolphin.upenn.edu/lc/index.html>); and a coalition of various Asian American groups called the Asian Pacific Student Coalition (APSC) (see <http://www.upennapsc.org/>). Additionally, the United Minorities Council (UMC) at the University of Pennsylvania is an umbrella group that brings together all of the various student of color organizations. See <http://unitedminoritiescouncil.org/>

Such groups regularly sponsor events that tackle within-group diversity: for example, when I was at Penn, Black student organizations frequently sponsored educational events that involved debates between Black nationalists and integrationists on a variety of issues.

backgrounds attend these events and participate in these groups. They learn about the different within-group perspectives firsthand,²⁰⁴ probably more so than in most classrooms.

Universities can collect information from these events and use this information to illustrate the educational benefits of within-group diversity—most notably for lessening racial stereotypes and promoting cross-racial understanding. Studying these phenomena would also illuminate how race-consciousness plays out within groups. Universities can also use all of this information to define and defend their race-conscious admissions policies as means to attain diversity within racial groups. In the process, universities should also more carefully define the admissions criteria they use to attain such intraracial diversity, and related these criteria specifically to their educational goals and missions.²⁰⁵

Additionally, diversity within racial groups may contribute to the compelling interest in another way: by preventing minority students from feeling “feel isolated or like spokespersons for their race.”²⁰⁶ Another reason to have a mix of minority students from higher and lower socioeconomic backgrounds is that the former, who have often attended predominantly White schools in affluent districts or elite, private schools, may help the latter adjust socially to elite, predominantly White universities and feel less isolated on those campuses. Shanta Driver, a lawyer for the student intervenors in *Grutter*, raised this point at a debate on affirmative action shortly after the Supreme Court’s ruling in *Grutter*. An audience member asked Ms. Driver why

²⁰⁴ See, e.g., Rebecca Borison, *United Minorities Council kicks off Unity Month*, DAILY PENNSYLVANIAN, November 11, 2012, <http://www.thedp.com/article/2012/11/united-minorities-council-kicks-off-unity-month> (noting that out-of-class events during United Minorities Council’s Unity Month aim to foster “exchange of ideas ... between students from all different backgrounds.”). Another aim of Unity Month is to “bridge the gap between Penn and its surrounding community [predominantly Black and working class West Philadelphia].” *Id.* This aim also promotes cross-racial understanding and helps to lessen racial stereotypes—both of which are part of the compelling interest that justify race-conscious admissions policies. See *supra* nn.____ and accompanying text. Moreover, Penn could tie this compelling interest directly to its race-conscious admissions policy, by “augment[ing] its outreach in surrounding neighborhoods ... [and] recruit[ing] more students directly from West Philadelphia ... [thereby] ... creat[ing] a renewed sense of connection to the local community[.]”). Harpalani, *supra* n.209.

²⁰⁵ Professor Devon Carbado notes various possible criteria that could drive intraracial selections in admissions. Carbado, *supra* n.32, at 1147-58. University admissions committees should aim to clarify how they use individualized review and discretion to serve their institutions’ educational missions.

²⁰⁶ *Grutter* at 319.

affirmative action should benefit more privileged members of minority groups. She responded by stating that at University of Michigan, about one-half of the Black undergraduate students come from relatively privileged families, while the other half come from inner-city Detroit, and that the “reason [Black students from the inner-city] survive on campus is because of the [more privileged Black students].”²⁰⁷

Ms. Driver’s assertion is important, albeit unproven. Affluent minority students may well serve as social supports for their less privileged peers,²⁰⁸ and they are present and available at social events and in residence halls late at night,²⁰⁹ when other university services may not be readily available. Of course, universities need to admit underprivileged minority students for these effects to occur. Elite universities in particular have been criticized for admitting mainly affluent and relatively privileged minority students,²¹⁰ and such critiques fuel Justice Thomas’s

²⁰⁷ See Harpalani, *supra* n.36, at 513 n.226. I was in attendance at the debate where Ms. Driver made these remarks. I cannot verify the numbers or the assertion by Ms. Driver, but I have witnessed similar examples of intragroup social support among minority students. Intragroup social support among minority students is a well-founded hypothesis and worthy of more empirical investigation.

²⁰⁸ *Id.*

²⁰⁹ Vinay Harpalani, *Diversity and Community Upliftment*, DAILY PENNSYLVANIAN, March 13, 2013, <http://www.thedp.com/article/2013/03/vinay-harpalani-diversity-and-community-upliftment> (noting that “[w]hile the university has support services for underprivileged students, it is their classmates who are available to help them in classes, at social events and in the dormitories late at night.”).

²¹⁰ *Id.* Similarly, Professors Kevin Brown and Jeanine Bell advocate for universities to distinguish between different Black groups, such as Black immigrants (from Africa and the Caribbean), multiracial persons, Black Latinos, and African Americans, when implementing their race conscious admissions policies. See Kevin Brown & Jeanine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1231 (2008)(questioning admissions policies “that lump[] all blacks into a single-category approach that pervades admissions decisions of so many selective colleges, universities, and graduate programs.”). Professors Brown and Bell further note that given “the growing percentage of blacks with a white parent and foreign-born black immigrants and their sons and daughters” at selective institutions, “blacks whose predominate racial and ethnic heritage is traceable to the historical oppression of blacks in the U.S. are far more underrepresented than administrators, admissions committees, and faculties realize.” *Id.* See also Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 How. L.J. 255, 302 (2011)(arguing that “admissions committees of selective higher education institutions should not provide treatment that is more favorable to Black immigrant applicants . . .”). Professors Henry Louis Gates and Lani Guinier have raised similar concerns. See Cara Anna, *Immigrants among blacks at colleges raises diversity questions*, BOSTON GLOBE, April 30, 2007, http://www.boston.com/news/education/higher/articles/2007/04/30/immigrants_among_blacks_at_colleges_raises_diversity_questions/?page=2 (“The issue of native vs. immigrant blacks took hold at Harvard in 2004, when professors Henry Louis Gates and Lani Guinier pointed out at a black alumni reunion that a majority of attendees were of African or Caribbean origin.”).

concerns that “racial aesthetics” rather than substantive educational benefits drive race-conscious policies.²¹¹ Diversity within racial groups requires attention not only to race, but also to socioeconomic status and other variables,²¹² and elite universities can do much better in ensuring that their student bodies are ethnically and socioeconomically diverse within racial groups.

While there have been many studies of campus climate and feelings of isolation among minority students,²¹³ universities should also investigate whether intragroup social support does occur among minority students, and whether diversity within racial groups helps to ensure that minority students adjust well and do not feel isolated. There is anecdotal evidence to support this view,²¹⁴ but universities should conduct empirical research focused on the question.²¹⁵ All of this information can help universities defend their compelling interest in diversity—and specifically their pursuit of diversity within racial groups.

2. Diversity Within Racial Groups and Narrow Tailoring

As noted earlier, the narrow tailoring principles articulated in *Grutter* also inherently facilitate diversity within racial groups, because they require universities to consider race flexibly, in conjunction with other factors.²¹⁶ The holistic admissions process affirmed in *Grutter*—which includes individualized review, considers race in a flexible manner, and uses diversity factors other than race—is well-suited to the goal of attaining diversity within racial

²¹¹ *Grutter* at 355 (Thomas, J., dissenting) (“A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic—so much so that the majority uses them interchangeably.”).

²¹² See Harpalani, *supra* n.36, at 495 (“By definition, achieving ... within-group diversity ... requires admissions committees to consider factors besides race and to treat applicants of the same race differently based on non-racial factors.”).

²¹³ See *supra* n.77.

²¹⁴ See *supra* n.207.

²¹⁵ Universities should also investigate intergroup social support: whether minority students of one group can serve as social supports for students of another group (for example, Black students supporting Native American students). See Harpalani, *supra* n.36, at 483 (“[I]f there are African American and Latino students in a class who speak up and share their views, then a Native American student may feel more emboldened to do so. ... {M}inority student organizations regularly collaborate on activities and interact and support one another at many institutions of higher education.”).

²¹⁶ See *supra* nn.105-106 and accompanying text.

groups within an admitted class. By considering race in a flexible, individualized manner, universities can consider other admissions factors—which vary among applicants of any given group—in conjunction with their use of race. In fact, universities must consider non-racial factors to attain diversity within racial groups.²¹⁷

As noted by the Supreme Court in several cases, such a process allows for admission of a diverse class, including diverse perspectives within each racial group.²¹⁸ This holistic admissions process also stands in contrast to the numerical set-asides rejected in *Bakke* and the point system rejected in *Gratz*, which do not facilitate within-group diversity in the admissions process, as these admissions plans merely identified an applicant’s race and mechanically using this information.²¹⁹

Universities should document specifically how their admissions processes facilitate within-group diversity and utilize *Grutter*’s narrow tailoring principles in the process. After *Fisher*, they may also have to illustrate why race-consciousness is necessary in this process. But as noted, if their educational missions clearly incorporate diversity within racial groups—to break down racial stereotypes—then defending race-conscious policies will be easier.²²⁰ With the exception of time limits on race-conscious admissions, the compelling interest and narrow tailoring principles of *Grutter* go hand-in-hand,²²¹ and both were affirmed by *Fisher*.

²¹⁷ See *supra* n.212.

²¹⁸ See, e.g., *Grutter* at 309 (“The Law School’s admissions program ... is flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application. ... The Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single “soft” variable. ... Also, the program adequately ensures that all factors that may contribute to diversity are meaningfully considered alongside race.”); *Gratz* at 271 (noting that “Justice Powell’s opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education.”); *Id.* at 272-73 (quoted in *Bakke* at 321 n.55 (Powell, J., concurring))(see *supra* n.196 for full quotation).

²¹⁹ See *supra* n.16.

²²⁰ See *supra* nn.____ and accompanying text.

²²¹ See Harpalani, *supra* n.36, at 494-95 (discussing how *Grutter*’s narrow tailoring principles facilitate diversity within racial groups in an admitted class).

C. Race-Conscious Campus Spaces and the Compelling Interest in Diversity

In conjunction with defending their use of race in admissions, universities should also directly tie the educational benefits of diversity on their campuses to race-consciousness, not just racial representation. In *Fisher*, UT's defense largely focused on racial diversity in classes.²²² In his *Grutter* dissent, Justice Clarence Thomas critiques the majority's reasoning as based on the assumption that:

Classroom aesthetics yield[] educational benefits, [race-conscious] admissions policies are required to achieve [racial diversity], and therefore the policies are required to achieve the educational benefits.²²³

On remand, the *Fisher* Plaintiffs have also continued to raise questions about UT's focus on classroom diversity.²²⁴ Additionally, while minority representation itself can help break down racial stereotypes, it is difficult to tie classroom diversity numbers to the tangible educational benefits of diversity espoused by the Supreme Court. Even small, discussion-oriented classes, such as the ones noted by UT in its Supreme Court brief, may not always focus on cross-racial understanding or bring out different perspectives related to race. In the future, universities should make greater efforts to document the educational benefits of racial diversity, both in classrooms and on campus more generally.

The latter is particularly salient because the educational benefits of racial diversity occur well beyond classrooms. Moreover, while there have been numerous studies of the benefits of diversity,²²⁵ these generally do not focus on the most racially diverse environments on many college campuses: race-conscious campus spaces. These are physical campus locations or campus initiatives and activities that focus on racial identity, whether for a specified racial group

²²² See Brief of Respondents, *Fisher v. Texas*, No. 11-345 (U.S. argued October 10, 2012). Available at <http://www.utexas.edu/vp/irla/Documents/Brief%20for%20Respondents.pdf>.

²²³ *Grutter* at 355 (Thomas, J., dissenting). Justice Thomas generally questions the link between racially diverse student bodies and any purported educational benefits. *Id.* at 355-57.

²²⁴ See *Brief of Appellants* at ____.

²²⁵ See, e.g., works cited in *supra* n.31.

or in a more general sense (i.e., a campus lecture or film series on race). Race-conscious campus spaces are often, though not always, “majority-minority” environments—where White students may not be a numerical majority or plurality on a regular basis. These spaces can include ethnic studies departments and programs, campus cultural centers, and residence halls devoted to the study and experiences of a particular racial/ethnic group (e.g., African Americans), all of which contribute to the educational benefits of diversity.

Legal and academic discourse on the benefits of diversity has focused on the presence of a “critical mass” of minority students in predominantly White settings. However, race-conscious spaces—once thought to cater to specific groups and promote “institutionalized separatism”²²⁶—are now becoming the most racially diverse environments on college campuses. For example, in the W.E.B. Du Bois College House, University of Pennsylvania’s residence hall devoted to African American studies, “46 percent of ... residents report a racial identity other than African American.”²²⁷ The Du Bois College House website states:

As the African American theme-based house, and in adhering to its original mission, most of the programs and events in Du Bois College House are based upon the history and culture of people of the African Diaspora. However, in recognizing the range of diversity within the House’s population, we must also acknowledge, not only its role as a microcosm of the Greater American society, but the House’s role in preparing our residents for the greater global world. Du Bois College House is one of the most diverse college houses on Penn’s campus, and often refers to itself as “the U.N. at UPenn!” This means that the entire staff works hard to ensure that our programming is just as diverse as the population, and that it meets the needs of all residents.²²⁸

²²⁶ ARTHUR M. SCHLESINGER, *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 104 (1992)(decrying “black dormitories” and other ethnic spaces as “institutionalized separatism”). See also WAYNE GLASKER, *BLACK STUDENTS IN THE IVORY TOWER* 115-146 (2002)(describing opposition to W.E.B. Du Bois College House at University of Pennsylvania).

²²⁷ Rachel E. Ryan, *Turmoil and Transformation: Du Bois House Turns 40*, PA. GAZETTE, Mar.-Apr. 2013, at 23, 24. This phenomenon is not unique to Du Bois College House or to Penn. During my time as Visiting Assistant Professor at Chicago-Kent College of Law, the most diverse student activity I have observed, in terms of attendance, was the Black Law Student Association’s “State of Black Chicago” Voting Rights Symposium in March 2013. Each of the four panelists were of a different racial background, and of approximately 40 attendees, one-half appeared to be Black, while the remainder appeared to be from a variety of backgrounds.

²²⁸ <http://dubois.house.upenn.edu/frontpage>; see also Ernest Owens, Farrah Alkhaleel, Simon Tesfalul, Taylor Blackston, *Appreciating Du Bois as a loving home*, DAILY PENNSYLVANIAN, October 15, 2012,

Moreover, not only are these spaces quite racially diverse, but they also often focus directly on race-related dialogue—thus directly facilitating the educational benefits noted in *Fisher*.

The Du Bois website also notes different events and activities that occur at Du Bois, many of which involve issues related to racial identity and equality.²²⁹ The discussions at these events, in conjunction with the diverse student population in Du Bois, epitomizes *Grutter* and *Fisher*'s values of promoting cross-racial interaction²³⁰ and “lessening of racial isolation and stereotypes.”²³¹

Cross-racial interactions and conversations involving race occur much more frequently in race-conscious campus spaces than they do in the typical classroom, or in most predominantly White settings. Perhaps more than any other spaces on campus, the specific educational benefits of diversity on campus—as espoused in Supreme Court jurisprudence—occur in environments such as the W.E.B. Du Bois College House. Academic and social discourse has historically treated Black-themed residence halls and similar environments as promoting “self-segregation” among groups of minority students.²³² Conversely, this Article argues that universities should actually look to these environments when documenting and defending the educational benefits of diversity that justify their race-conscious admissions policies.²³³

<http://www.thedp.com/article/2012/10/du-bois-house-council-appreciating-du-bois-as-a-loving-home> (“Du Bois [College House] is not just a space for black students. It is a college house for students of all cultures. ... Du Bois has evolved to serve as a college house for Penn students. We haven’t forgotten our heritage, but we also wish to accommodate a more diverse group of residents. We are no longer a college house that caters solely to the black community, but one that still emphasizes Africana interests through its programming.”).

²²⁹ <http://dubois.house.upenn.edu/frontpage>

²³⁰ *Grutter* at 330 (“[T]he educational benefits that diversity is designed to produce ... are substantial [and include] promot[ing] ‘cross-racial understanding,’ ... break[ing] down racial stereotypes, and ‘enabl[ing] [students] to better understand persons of different races.’”).

²³¹ *Fisher* at 2418.

²³² *See supra* n.226.

²³³ Some of these spaces, such as the Greenfield Intercultural Center at Penn, also focus specifically on bringing together different groups of minority students such Black and Latino students. *See* <http://www.vpul.upenn.edu/gic/>

In addition to facilitating the educational benefits of diversity for students of all backgrounds, spaces such as the W.E.B. Du Bois College House also serve another aspect of the compelling interest in diversity: they help minority students feel less “isolated or like spokespersons for their race.”²³⁴ They are some of the few environments on campus where particular groups of minority students might actually be in a numerical majority, and they function as social support centers for minority students. Universities already recognize these phenomena, but studying and documenting them in detail can help in the defense of race-conscious admissions policies.²³⁵

By highlighting race-conscious spaces as venues for the educational benefits of diversity, along with their established role as support centers for minority students, universities can more thoroughly demonstrate the benefits of race-conscious dialogue itself—not just for minority students but for all students. This would also augment the defense of race-conscious admissions policies, as it would very tangibly illustrate their educational benefits and highlight the salience of race in universities’ educational missions—going beyond the “racial aesthetic” decried by Justice Thomas.²³⁶

In fact, both of the suggestions in this Article—emphasis on diversity within racial groups, and increased attention to race-conscious spaces—illustrate that the compelling interest in diversity can readily incorporate race-consciousness in various ways beyond admissions. By incorporating race-conscious programs and policies as central components of their educational missions, universities will more readily be able to defend their race-conscious admissions policies as narrowly tailored means to attain the educational benefits of diversity. After *Fisher*’s

²³⁴ Grutter at 319.

²³⁵ One recent article that does focus on these spaces is Meera E. Deo, *Two Sides of a Coin: Safe Space & Segregation in Race/Ethnic Specific Law Student Organizations*, 42 WASH. U. J. OF LAW & POL’Y 83 (2013).

²³⁶ Grutter at 355 (Thomas, J., dissenting).

call for more stringent review, universities should aim to tie all of these endeavors to race-conscious spaces and programs that further their educational missions.

CONCLUSION

In spite of its quest for race-neutral alternatives, *Fisher* does not spell doom for race-conscious admissions policies. This Article argues that the Supreme Court's broadly-defined compelling interest in diversity, its endorsement of nuanced consideration of race in admissions, and its deference to universities in defining their educational missions, all actually support universities' continuing use of race-conscious admissions policies. Through its articulation of educational benefits of diversity, such as lessening racial stereotypes, and its emphasis on individualized, nuanced consideration of race, *Fisher* gives universities room to show that "no workable race-neutral alternatives would produce the educational benefits of diversity."²³⁷

Nevertheless, this Article also calls on universities to do more than they have done to defend their race-conscious policies and programs. UT did argue that its race-conscious admissions policy facilitates diversity within racial groups, but universities can do much more to show how such within-group diversity relates to their compelling interest in diversity, and how their pursuit of diversity within racial groups is in line with *Grutter* and *Fisher*'s narrow tailoring principles. This Article gives tangible suggestions for how universities can illustrate the importance of diversity within racial groups.

Additionally, this Article argues that universities should highlight not only diversity within classrooms and within predominantly White settings, but also in race-conscious campus spaces where White students may not be the plurality. Such spaces do not merely cater to minority students: they are often the most salient venues for the educational benefits of diversity.

²³⁷ *Fisher* at 2420.

Cross-racial interactions and lessening of racial stereotypes occur readily when White students are exposed to race-conscious campus spaces and partake in dialogues on race that are framed from the perspectives of minority students. These spaces also help minority students to feel less isolated and tokenized on campus. Universities should study and document all of these phenomena.

In a broader sense, this Article calls upon universities to embrace race-consciousness—not only in their admissions policies but also in their educational missions and campus activities that promote the benefits of diversity. Future defense of race-conscious admissions will require that universities be open and assertive about the importance of race, not only in admissions, but in everyday education and campus life. This endeavor may well meet resistance and generate political and legal controversy.²³⁸ Nevertheless, there always has been and always will be such controversy surrounding race-conscious programs and policies, and universities should be assertive in defending them. By requiring stringent review of the need for race-conscious admissions in *Fisher*, the Supreme Court essentially requires universities to take such a position.

As such, universities should embrace not only diversity, but race-consciousness more broadly. They should do so not only in admissions or in special programs, but in their educational missions. In his 1978 *Bakke* dissent, the late Justice Harry Blackmun stated that “[i]n order to get beyond racism, we must first take account of race ... [t]here is no other

²³⁸ There could be two levels of opposition to such openness. There are those who oppose race-conscious policies altogether. See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007) (Part IV of majority opinion, authored by Chief Justice Roberts and joined by Justices Alito, Scalia, and Thomas, which states “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). But there also those who may support such policies, but believe that stealth in pursuing them is a constitutional value. See Heather Gerkin, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007) (characterizing Justices Powell and O’Connor’s views as “something akin to a ‘don’t ask, don’t tell’ approach to race-conscious decisionmaking: use race, but don’t be obvious about it.”) (internal citation omitted). See also Paul Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 928 (1983) (“The indirectness of the less explicitly numerical systems may have significant advantages, not so much in terms of the processes of consideration as in the felt impact of their operation over time. The description of race as simply ‘another factor’ among a lot of others considered in seeking diversity tends to minimize the sense that minority students are separate and different and the recipients of special dispensations; the use of more explicitly separate and structured systems might have the opposite effect.”).

way.”²³⁹ More recently in her *Schuette* dissent, Justice Sonia Sotomayor contended that “[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race.”²⁴⁰ While Supreme Court jurisprudence as a whole is currently hostile to these views, universities can and should use the Court’s broadly defined diversity interest to embrace race-consciousness, and to show that race-conscious admissions policies are necessary to fulfill their educational missions.

²³⁹ *Bakke* at 407 (Blackmun, J., dissenting).

²⁴⁰ *Schuette* (Sotomayor, J., dissenting) at ___.